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IN THE

Supreme Court of the United States

CITY OF KENNEWICK, A MUNICIPAL CORPORATION; JOHN DOE BONNALIE & JANE DOE BONNALIE, HUSBAND AND WIFE, INDIVIDUALLY AND AS MARITAL COMMUNITY; R.B. KOHN & JANE DOE KOHN, HUSBAND & WIFE, INDIVIDUALLY AND AS A MARITAL COMMUNITY; DEPUTY JOHN DOE QUAKENBUSH & JANE DOE QUAKENBUSH, HUSBAND & WIFE, INDIVIDUALLY AND AS A MARITAL COMMUNITY;

Petitioners,

v.

KEN and MARY LOU ROGERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision holding that the unexpected and unintended actions of a police canine dog in leaving its handler and jumping a fence to "bite and hold" a suspect constituted an "intentional" seizure under the Fourth Amendment?

2. Whether the police officers involved in a search with the assistance of a police canine dog are entitled to qualified immunity when the dog unexpectedly bolts from the handler's control?

PARTIES TO THE PROCEEDING

Petitioner: The Petitioners are Kennewick Police Officers Bradley Kohn and Ryan Bonnalie, and Benton County Deputy Sheriff Jeff Quackenbush.

Respondent: The Respondents are Ken Rogers and his wife Mary Lou Rogers.

Other Defendants Below: The additional defendants below are Kennewick Police Officer Sgt. Richard Dopke, the City of Kennewick Washington and Benton County. Sgt. Dopke has filed a separate Writ of Certiorari. The trial court granted a partial summary judgment dismissing the 42 U.S.C.A. § 1983 claims brought against the City of Kennewick and Benton County.

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Petitioners, Officers Kohn and Bonnalie and Deputy Quackenbush respectfully request that a Writ of Certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit entered in this case. The Ninth Circuit, in conflict with other Circuits and prior rulings of this court, incorrectly ruled that a fourth amendment seizure had occurred and denied the petitioner police officers their right to qualified immunity where a police canine unexpectedly bolted from the control of the officers, leaped a fence and "bit and held" a person sleeping inside the fenced backyard. The officers did not intentionally seize the suspect, were not aware that the unexpected actions of the police canine could result in a constitutional violation and cannot be held liable for claimed civil rights violations as a result of their negligence.

OPINIONS BELOW

The opinion of the court of appeals is not reported but is reproduced at Pet.App. A 1a-6a. The order of the district court denying Petitioners' qualified immunity is unreported, but is reproduced at Pet. App. C 19a-67a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on August 3, 2006. (Pet. App. A 1a-6a) The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 13, 2003, Sgt. Richard Dopke, of the Kennewick Police Department encountered a male suspect riding a small motorcycle. The suspect was not wearing a protective helmet, nor did the suspect have lights on the vehicle. (Pet. App. C 20a-21a) Sgt. Dopke activated his lights and siren, but the suspect did not stop. (*Id.*) The suspect drove the motorcycle directly into an open garage at 6902 W. Umatilla. The garage door closed immediately behind the suspect. (Pet. App. C 21a) Sgt. Dopke called for backup. (*Id.*)

After backup officers arrived at the scene, Sgt. Dopke contacted occupants in the house and was given consent to

enter and search the house. (Pet. App. C 21a) The occupants told Sgt. Dopke that the operator of the motorcycle was a person named "Troy". (*Id.*) They stated that Troy had borrowed the motorcycle, had just returned and ran through the house and out the back door. (*Id.*) Sgt. Dopke did not entirely believe the witnesses about the operator of the motorcycle and decided to call for assistance of a K-9 search team to determine if the dog could detect any fresh scent in the backyard area to corroborate witness' story. (Pet. App. C 22a)

Sgt. Dopke asked Officer Bradley Kohn, a trained dog handler, to start the search at the back door of the residence where Troy ran out into the backyard. Officer Kohn complied and reported that "Deke", a trained police tracking dog, picked up a scent in the backyard. (*Id.*) Sgt. Dopke then asked Officer Kohn, Officer Ryan Bonnalie and Benton County Deputy Sheriff Jeff Quackenbush to continue the search by going around the block to the adjoining yard near where the dog picked up the scent. (*Id.*)

Officer Kohn started searching for the suspect with his dog under the control of a leash. (*Id.*) At one point, Officer Kohn was searching in the area of 6911 W. Victoria. The backyard of this residence borders the backyard of the residence where Deke, the police dog, first located a scent. (*Id.*) The dog led the officers to the driveway of the residence at 6911 Victoria. Within the driveway was a boat with a trailer, an enclosed utility trailer and a mini-van. The driveway was open on three sides and bordered on the fourth side by a wooden fence. The dog's leash became entangled on the hitch of the boat trailer and Officer Kohn removed Deke from the leash to continue the search in the driveway area. (Pet. App. C 22a-23a) Officer Kohn stood at the side

of the driveway so he could see if the dog left the driveway area. (Pet. App. C 23a)

A very short time passed and Officer Kohn heard someone yell "Hey". (Id) He could tell that the voice came from further back in the backyard. Unbeknownst to Officer Kohn, the dog had gone through or over the fence and contacted a suspect. Once he heard the suspect yell, Officer Kohn yelled back that he was with the Kennewick Police. (*Id.*) He looked over the fence and saw Ken Rogers on his knees facing the fence. (*Id.*) The dog was holding Rogers by his left arm. (*Id.*) Officer Kohn again announced "Kennewick Police K-9 Unit, stop fighting the dog and I will release him." (*Id.*) As soon as Officer Kohn yelled for Rogers to stop fighting the dog, Mr. Rogers stopped looking at Officer Kohn and then started punching the dog in the head with his right fist. (*Id.*)

Officer Kohn and Officer Bonnalie started pulling some fence boards off to get into the back yard. Officers Kohn, Bonnalie and Deputy Quackenbush then entered the backyard and subdued Rogers. (*Id.*)

REASONS FOR GRANTING THE PETITION

A. The inadvertent contact by the police canine after unexpectedly bolting from the handlers control was not an intentional seizure under the Fourth Amendment.

In this case, it is undisputed that while the Officers were using Deke to search the driveway area outside of a fenced backyard, Deke unexpectedly (and uncharacteristically) bolted from the Officers control, jumped a tall wooden fence

and contacted Ken Rogers inside of a fenced backyard. The Officers did not verbally command Deke to enter the fenced backyard and did not intend that he do so. Despite the fact that Deke unexpectedly jumped the fence, the Ninth Circuit incorrectly held that the police officers in this case, intentionally seized Rogers. This ruling is error and contrary to this court's holdings in a number of cases that there can be no constitutional violation for a wrongful seizure where there is no intent to seize. *See*, *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989); In accord, *Medeiros v. O'Connell*, 150 F.3d 164, 167 (2d Cir. 1998).

While this court has not addressed the issue with regard to police dogs, recently, the Connecticut District Court ruled on a similar situation in *Cardona v. Connolly,* 361 F.Supp.2d 25 (D.C. Conn. 2005) where while the officer was distracted, the police dog got out of the patrol car and bit the handcuffed passenger. The passenger sued, claiming excessive force and unlawful seizure. The court first analyzed whether the dog biting was a seizure at all. The court noted that a seizure must be a knowing and intentional act and not an accident. *Cardona*, 361 F.Supp.2d at 33.

> Although, [the police officer] had seized Cardona through the use of handcuffs, there is no indication that [the police officer] intended for Kemo [the police dog] to bite Cardona. That is, [the police officer] never meant to use this particular "instrumentality" (i.e. Kemo) in order to effect Cardona's seizure. There is no evidence that [the police officer] gave Kemo an order to attack Cardona, nor is there evidence that [the police officer] actually saw Kemo approach Cardona.

Cardona, 361 F.Supp.2d at 33.

The *Cardona* court acknowledged and distinguished cases where the officer ordered the dog to find and seize the suspect, and concluded:

> Accordingly, the court finds that the dog bite did not constitute Fourth Amendment seizure because [the police officer] did n t intentionally use the police canine to bring about such a seizure. Without a Fourth Amendment seizure, Cardona's claim that the dog bite was an "unreasonable" seizure under the Fourth Amendment certainly cannot stand.

Cardona, 361 F. Supp.2d at 34.

The holding in *Cardona* is consistent with this courts ruling that a seizure occurs only if it is intentional, as this court noted in *Brower*:

> It is clear that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Brower, 489 U.S. at 596-97 (emphasis in original).

The court in *Andrade v. City of Burlingame*, 847 F. Supp. 760, 763-65 (N.D.Cal. 1994), *aff'd sub nom.*, *Marquez v.*

Andrade, 79 F.3d 1153 (9th Cir. 1996) also recognized this intentionality requirement in a case involving an accidental biting by a police dog, where the court, in granting summary judgment dismissing the plaintiffs claims, wrote:

> In the instant case, it is undisputed that Officer Harman did not intend to use his police dog to subdue the plaintiffs. Indeed, the officer had already halted the plaintiffs' movement when the dog escaped from the car and bit Rocio Andrade and Jackie Marquez. The plaintiffs had already been seized. Plaintiffs attempt to argue that because the *dog* intended to bite the two girls, its actions were "intentional" and thus a seizure within the meaning of *Brower.* The dog is not a defendant in this suit nor could it be. Nor is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no."

Andrade, 847 F.Supp. at 764 (emphasis added).

The Court of Appeals mistakenly equated the temporary unleashing of a police dog in order to untangle his leash in an area *outside of a fenced* backyard with the act of verbally commanding a police dog to attack a suspect. The two situations simply do not equate. The Officers in this case do

not quarrel with the proposition that if Deke had contacted a suspect in the driveway area without further verbal command or if they had intentionally commanded Deke to enter into the fenced backyard to locate a suspect, then there actions would constitute a fourth amendment seizure. However, that is not the case before this court. In this case, Deke unexpectedly left the area of the driveway and entered an enclosed backyard, on his own. The officers did not intend to seize anyone in the fenced backyard at the moment that Deke bolted from their presence.

It is undisputed that Officer Kohn did not command Deke to enter the backyard to find and hold anyone. At the very least, constitutionally, such a command is required. The Court of Appeals glosses over this fact and incorrectly concludes that "Officer Kohn had 'effectively ordered' the dog to bite the individual he was tracking". (App. C-3 Internal quotations added) Since it is undisputed that Officer Kohn did not command the dog to enter the fenced area, the Court of Appeals ruling is incongruous. In every case where a court addressing the issue has determined that a seizure occurred the officer, at the very least, gave the dog a command to enter an enclosed area and locate a suspect. *See*, *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998); *See also*, *Ruvalcaba v. City of Los Angeles,* 167 F.3d 514, 517 (9th Cir. 1999); *Vera Cruz v. City of Escondido,* 139 F.3d 659, 663 (9th Cir. 1998); *Kuha v. City of Minnetonka*, 328 F.3d 427, 434 (8th Cir. 2003); *Matthews v. Jones,* 35 F.3d 1046, 1051 (6th Cir. 1994); *Robinette v. Barnes,* 854 F.2d 909, 911 (6th Cir. 1988); *Kopf v. Wing,* 942 F.2d 265, 268-69 (4th Cir. 1991).

Requiring the officer to intentionally and verbally command the police dog to enter an enclosed area is an

important requirement, since the officer also has a concomitant duty to shout out a warning to anyone in the enclosed area, prior to commanding the dog to enter, to give anyone in the enclosed area a chance to voluntarily come out. *See Vathekan,* 154 F.3d at 176-77. In fact, the failure of the officer to give the verbal warning to occupants before releasing the dog is, as a matter of law, unreasonable in an excessive force context and would render the officer liable for a constitutional tort. *Id.* at 179-180. However, under the Ninth Circuit's "effectively ordered" analysis, the police officer would never be able to shout out the required warnings to occupants of the enclosed space and therefore, would always be liable for the dog's contact with them. Effectively, the Ninth Circuit creates a rule where police officers are held liable for a civil rights violation *for their unintentional and accidental conduct.* The liability in *Vathekan* was clearly premised on the officers intentional verbal command to the police dog to enter an enclosed area and "Find him" without first giving a loud warning to occupants in the area. At a minimum, the officer in *Vathekan* knew that the dog was going to enter the enclosure and contact anyone inside. The court's ruling in *Vathekan* would have been far different if the officer had been searching outside of the house for a suspect and the dog unexpectedly bolted from the officer's presence and entered the house.

The Ninth Circuit has fashioned a ruling that effectively prohibits police officers from ever using a police dog "off-lead" for fear that the dog might unexpectedly bolt into an adjacent enclosed area. This ruling would have a number of consequences to officer safety and contradicts the Eighth Circuits ruling that it is objectively reasonable to utilize a police dog off-lead. *Dennen v. City of Duluth,* 350 F.3d 786, 792 (8th Cir. 2003)

At bench, the officer did not give an intentional command to the police dog to find and bite anyone. The officer had the dog off-leash but presumably under his control to search the confined area outside of the fence area where Rogers was sleeping. Unexpectedly, "Deke", the police dog, bolted from the confined area and, *without any command from the officer*, located and held Rogers. The officers did not intentionally seize Rogers. The Ninth Circuit's ruling, if left in place, will effectively result in holding every police dog handler constitutionally liable for any actions of any police dog while off-leash and imposes on a police officer an impossible "Catch-22" duty to give a warning before the dog under his control unexpectedly bolts from his control and bites a third person on its own. The unfortunate situation involving Rogers was simply an accident that would not have happened if the police dog had not unexpectedly bolted from the area. It did not and should not rise to the level of an intentional constitutional tort. No governmental "seizure" has occurred. The Ninth Circuit's opinion should be reversed.

B. The Individual Police Officer Defendants Are Entitled To Qualified Immunity

Police Officers Bonnalie, Kohn, and Quackenbush are protected by the concept of qualified immunity from Rogers' claims against them. Qualified immunity is an important constitutional protection for our public servants. Qualified immunity is a question of law to be decided by the court. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194 (2001) (*citing Mitchell v. Forsyth*, 472 U.S. 511 (1985)). The privilege is an immunity from suit rather than a mere defense

to liability and it is effectively lost if a case is erroneously permitted to go to trial.

Government officials performing discretionary functions are entitled to qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. *Creighton v. Anderson*, 483 U.S. 635 (1987); s*ee also*, *Malley v. Briggs,* 475 U.S. 335, 341, (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth,* 472 U.S. 511, 528, (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Hallstrom v. Garden City,* 991 F.2d 1473, 1482 (9th Cir.), *cert. denied,* 510 U.S. 991, (1993); *Davis v. Scherer,* 468 U.S. 183, 191 (1984). The entire purpose of qualified immunity is to protect police officers from civil suits because of decisions they make in the field, often under life or death situations, as long as they make the decisions competently.

This determination requires a two-part analysis. First, the court must determine whether the law governing the official's conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under that clearly established law, a reasonable officer could have believed the conduct was lawful. This is a test of the "objective reasonableness" of the defendant's actions.

1. There Was No Clearly Established Constitutional Right Violated in the Use of the Police Dog

If the court decides that there was a seizure in this case then it must decide if the seizure was constitutional. In establishing his case, Rogers must demonstrate that the police officers, by their conduct, violated a clearly established constitutional right of Rogers. In so deciding, the court must first determine whether the facts alleged show the officer's conduct violated *a particular clearly defined constitutional right. Saucier v. Katz, supra* at 201. The court must determine *the particular* constitutional right at stake and cannot simply rely on a generalized right, such as the right to be free from illegal searches or seizure or the right generally to be free from the excessive use of force. *Brosseau v. Haugen,* 534 U.S. 194 (2004). Give the unique facts in this case, the particularized constitutional right at stake is:

> Whether a citizen has the constitutional right to be free from an officer's conduct in unleashing a trained police dog to continue a search in an area where the dog, unexpectedly and without any command from the handler, bolts from the officer, jumps a fence and "bites and holds" a suspect in an enclosed backyard.

Rogers cannot point to any case law or other authority that recognizes such a right. In other words, does the citizen have a constitutional right to be free from being held by a police dog that enters an enclosed area unexpectedly and without the officer commanding the dog to enter?

Certainly, our courts have sufficiently defined the constitutional rights where an officer *intentionally* commands

a dog to bite and hold a suspect. In that situation the court requires that the officer first announce the release. *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994), (finding that the officers enjoyed qualified immunity when releasing a dog to bite and hold a fleeing defendant after warning him). However, our courts have not defined the particular confines of any constitutional rights violation where the police dog unexpectedly and without command "bites and holds" a suspect. Under the circumstances of this case, Officer Kohn could not reasonably have known how to pattern his conduct so as to avoid liability.

The only clearly defined and recognized limitation on the use of police dogs to track and hold suspects is the general requirement that an officer announce his intention to release the police dog prior to intentionally releasing the dog into a building or other confined area where he believes the suspect is hiding. *See*, *Writ, supra*. The officers, at bench, were not faced with a situation where they were sending a police dog unleashed into a building to bite and hold a suspect they believed was in the building. Here, there was no warning because the officers did not intend the police dog to leave the confined area where the dog was searching. Therefore, the advance warning requirement could not logically apply to them. Simply stated, there was no clearly established constitutional right at stake here that the officers should have known about.

2. Even If There Was A Clearly Established Right, A Reasonable Officer Could Have Believed His Conduct Lawful Under The Circumstances Of This Case

Even if the law governing the officer's conduct in this unusual case was clearly established, qualified immunity is still available if a reasonable police officer could have believed his conduct was lawful under that clearly established law. *Hallstrom,* 991 F.2d at 1482. In other words, if a reasonable K-9 officer could, under the case law, believe that it would be lawful to unleash his dog in a confined area in order to untangle the lead, then Officer Kohn would be entitled to qualified immunity. "The 'reasonableness' of a particular action must be judged from the perspective of a reasonable officer on the scene. . . ." *Graham v. Connor,* 490 U.S. 386, 396 (1989). *See also, Anderson,* 483 U.S. at 641. The reasonableness inquiry is, however, objective, asking "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 397.

Officer Kohn could have believed that his conduct was lawful under the circumstances of this case because, at the time of the incident, the existing case law only addressed the circumstances under which a police officer could *intentionally* release and command a police dog to "bite and hold" a suspect. Indeed, a number of jurisdictions have concluded that it is lawful for a police officer to use a police dog to track, find, and when necessary, intentionally command a police dog to "bite and hold" a suspect. *Kuha v. City of Minnetonka, supra* at 434; *Jarrett v. Town of Yarmouth,* 331 F.3d 140, 150 (1st Cir. 2003); *Matthews v.*

Jones, 35 F.3d 1046, 1051 (6th Cir. 1994); *Kerr v. City of West Palm Beach,* 875 F.2d 1546, 1553 (11th Cir. 1989); *Mason v. Hamilton County,* 13 F. Supp.2d 829, 835 (S.D.Ind. 1998)

Furthermore, it was objectively reasonable to utilize Deke off lead if the officer felt it appropriate. *Dennen v. City of Duluth, supra.* Deke was searching in an open area adjacent to an enclosed fenced backyard. Officer Kohn was concerned that the suspect might be in one of the vehicles in the driveway. It was necessary for Deke to search while the officers remained in a place of safety. The fact that Deke unexpectedly jumped the fence and located Rogers was not something that Officer Kohn would reasonably expect or anticipate. Deke was a well-trained and reliable police dog and had not given Officer Kohn any indication of any tendency to bolt. The officer's conduct, when reviewed under the guidance of the Fourth Amendment, was "objectively reasonable."

A police officer cannot negligently violate a person's civil rights. *Civil Rights violations require some purposeful conduct. See, Brower v. County of Inyo,* 489 U.S. 593, 596-97 (1989). As the Second Circuit explained:

> It makes little sense to apply a standard of reasonableness to an accident. If such a standard were applied, it could result in a fourth amendment violation based on simple negligence. The fourth amendment, however, only protects individuals against "unreasonable" seizures, not seizures conducted in a "negligent" manner. The Supreme Court has not yet extended liability under the fourth amendment to include negligence

> claims. Only cases involving intentional conduct have been considered by the Supreme Court. Negligence, in fact, has been explicitly rejected as a basis for liability under the fourteenth amendment.

Dodd v. City of Norwich, 827 F.2d 1, 7-8 (2d Cir. 1987).

Officer Kohn, at best, acted negligently when he released the dog to untangle the leash. The evidence is undisputed that he did not intentionally command the dog to enter the backyard and locate anyone. Therefore, he cannot be held responsible for an alleged Fourth Amendment violation because of his negligence. To hold, otherwise would make Officer Kohn guilty of an intentional violation of the plaintiff's Fourth Amendment rights solely by virtue of his negligence. This is not the law in the United States. The officers' actions viewed objectively were reasonable.

CONCLUSION

The Ninth Circuit has imposed upon these police officers heavy constitutional liability for there unintentional and negligent conduct. The Court had created a rule that makes the officers liable for a "seizure" that was unintentional and unexpected by them. This rule is contrary to the previous rulings of this court and every other circuit court. For the reasons stated herein a Writ of Certiorari should issue from this court.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 3, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-35299

D.C. No. Cv-04-05028-EFS

KEN ROGERS; MARY LOU ROGERS,

Plaintiffs - Appellees,

V.

CITY OF KENNEWICK; BENTON COUNTY, WASHINGTON, a political subdivision in the State of Washington; RICHARD DOPKE, husband, individually and as a martial community; JANE DOE DOPKE, wife, individually and as a martial community,

Defendants,

And

JOHN DOE BONNALIE, husband, individually and as a martial community; JANE DOE BONNALIE, wife, individually and as a martial community; R.B. KOHN, husband, individually and as a martial community; JANE DOE KOHN, wife, individually and as a martial community; JOHN DOE QUACKENBUSH, Deputy, husband, individually and as a martial community; JANE DOE QUACKENBUSH, wife, individually and as a martial community,

Defendants - Appellants.

Appendix A

MEMORANDUM*

Argued and Submitted April 12, 2006
Spokane, Washington

Before: FARRIS, THOMAS, and McKEOWN, Circuit Judges.

Defendants, former and current police officers of the City of Kennewick, Washington, appeal from the district court's orders denying summary judgment on the defense of qualified immunity. We have jurisdiction to review orders under the collateral order doctrine, *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir.1998), and we affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

The district court did not err in concluding that the officers effected an unconstitutional seizure of Rogers in violation of the Fourth Amendment. A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989)(emphasis omitted). The officers argue that there can be no Fourth Amendment seizure in this case because they did not intend to seize Rogers. Under *Brower*, "[a] seizure occurs even when an unintended person

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

or thing is the object of the detention or undertaking, but the detention or taking itself must be wilful." *Id.* at 597 (internal citations omitted). Therefore, it is of no consequence that the officers were not looking for Rogers specifically, so long as their actions were intentional. Viewing the facts in the light most favorable to Rogers, as we must at this stage, *Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir.2004), officer Kohn had control over the dog when it bit Rogers, and Kohn had effectively ordered the dog to find and bite the individual he was tracking. Therefore, under these factual assumptions, it is of no legal consequence whether Kohn and his fellow officers intended to restrain Rogers specifically, or merely intended to restrain an unidentified person the officers were tracking, as the district court correctly concluded.

II

The district court did not err in denying summary judgment to the officers involved in the deployment of the dog and the subsequent seizure of Rogers. Under the familiar *Saucier* analysis, "[a] court required to rule upon the qualified immunity issue must consider [a] threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If there is such a showing, "the next, sequential step is to ask whether the right was clearly established." *Id.*

Under *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), claims of excessive use of force are examined for "reasonableness." *Id.* at 396. The relevant

factors in such an inquiry include "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005) (en banc) (quoting *Graham*, 490 U.S. at 396) (alterations in original). "[A]n additional factor . . . is the availability of alternative methods of capturing or subduing a suspect." *Id.* at 703.

Taking the facts in the light most favorable to Rogers, the "suspect" in this case was wanted for two traffic infractions and a misdemeanor violation for failing to stop when signaled by the police, and there was no evidence that the suspect was armed or dangerous. There was, in fact, little evidence that any such fleeing suspect actually existed. Indeed, the initiating officer did not believe that the suspect had left the house into which he originally fled. The evidence is disputed as to whether Kohn provided an audible warning prior to releasing a "bite and hold" dog, so we must assume for the purposes of our analysis that no warning was afforded.

Given the minor severity of the crime in question, the lack of any evidence that the suspect posed a threat to the safety of the officers, and was not attempting to evade arrest by flight, the district court properly concluded in a thorough and thoughtful analysis that the facts as alleged established a violation of Rogers' constitutional rights.

The district court also properly concluded that the law was clearly established at the time of the incident so that a "reasonable officer would recognize that his or her conduct

violates that right under the circumstances faced, and in light of the law that existed at that time." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir.2006). The critical element in this analysis is whether existing law defines the components of the *Graham* reasonableness analysis with regard to the particular circumstances. *Motley v. Parks*, 432 F.3d 1072, 1088-89 (9th Cir.2005) (en banc). The district court carefully examined these questions, and concluded that there was clearly established case law holding that: (1) failing to give a warning before releasing a police dog to bite and hold is unreasonable, (2) causing a bite and hold dog to enter the backyard without a warrant was unreasonable even if the officers believed that somebody was in the yard, (3) allowing the dog to continue biting a suspect for at least a minute was unreasonable, and (4) repeatedly striking a subdued and prone suspect is unreasonable. Therefore, the district court properly denied the officers' request for qualified immunity under *Saucier*.

III

The district court also properly denied summary judgment to Sgt. Dopke, who was the initial officer requesting police dog backup. Dopke argues that he was not present at the time of the attack. However, at the time of the incident, it was clearly established that a supervisor can be held liable for the actions of subordinates if he "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Watkins*, 145 F.3d at 1093 (internal quotations and citations omitted). Here, viewing the facts in the light most

favorable to Rogers, Dopke authorized Kohn to search private backyards for a misdemeanor traffic suspect despite Dopke's belief that the suspect was in the house he had investigated and was not fleeing at all. Dopke considered the search a "pursuit," and department regulations provided that officers should not initiate pursuits of suspects of traffic misdemeanors. Given these circumstances, the district court properly concluded that there was a triable issue of fact as to whether authorizing the search was reasonable.

IV

We lack appellate jurisdiction over the interlocutory appeal of the state law claims. 28 U.S.C. § 1291.

AFFIRMED.

APPENDIX B —AMENDED ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON DATED MARCH 21, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CV-04-5028-EFS

KEN AND MARY LOU ROGERS,

Plaintiffs,

v.

CITY OF KENNEWICK, a municipal corporation, BENTON COUNTY, WASHINGTON, a political subdivision in the State of Washington, RICHARD AND JANE DOE DOPKE, husband and wife, individually and as a marital community, JOHN DOE AND JANE DOE BONNALIE, R.B. KOHN AND JANE DOE KOHN, JOHN DOE QUACKENBUSH AND JANE DOE QUACKENBUSH,

Defendant.

AMENDED[1] ORDER DENYING DEFENDANT DOPKE'S MOTION FOR SUMMARY JUDGMENT

1. This Order amends the Court's previous Order Denying Defendant Dopke's Motion for Summary Judgment, (Ct. Rec. 63). This Order removes the Court's analysis as to Plaintiff's 42 U.S.C. § 1983 cause of action and Defendant's qualified immunity argument as these issues are now addressed in the Court's Order Denying in (Cont'd)

Appendix B

A hearing was held in the above-captioned matter on February 1, 2005. The Plaintiffs Ken and Mary Lou Rogers were represented by Diehl Rettig and Larry Ziegler. Michael McFarland appeared on behalf of Richard and Jane Doe Dopke, and Jerry Morberg appeared on behalf of Benton County. Before the Court was Defendant Dopkes' Motion for Summary Judgment, (Ct. Rec. 27). After reviewing the submitted material and relevant statutory and case law, and taking oral argument, the Court was fully informed. This order memorializes and supplements the Court's bench ruling denying in part and withholding in abeyance in part Defendant Dopke's motion.

A. Factual Background[2]

On the evening of July 13, 2003, at approximately 12:55 a.m. while on duty with the Kennewick Police Department (KPD), Sergeant Richard Dopke observed a man riding a "mini-moped" without lights and without a helmet on Canal Drive.[3] Sergeant Dopke radioed dispatch and activated his

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(Cont'd)

Part and Granting in Part Defendants' Motion for Summary Judgment, etc. (Ct. Rec. __). With this removal, this Order enters the same analysis and rulings as contained in the Court's initial Order Denying Defendant Dopke's Motion for Summary Judgment, (Ct. Rec. 63).

2. The Court is to view the facts in Plaintiff's favor when considering a motion for summary judgment. This factual background is created utilizing this standard.

3. Operating a moped without lights and without a helmet is a civil infraction. Willfully failing to stop a motor vehicle when signaled to do so by a police officer is a misdemeanor, R.C.W. § 46.61.022.

overhead lights and video camera to effect a traffic stop, but the moped continued traveling at 25-30 m.p.h., turning onto Kellogg and then Umatilla.[4] Sergeant Dopke activated his siren and followed the moped another block, where the driver turned into the driveway of the residence located at 6902 W. Umatilla. The man drove directly into the garage, at which time a woman closed the garage door behind him.

Sergeant Dopke called for backup units. After the arrival of additional units, Sergeant Dopke made contact with two women, Tara Holland and Pam Sokey, at the residence. Sergeant Dopke told the women that if the person driving the moped would simply identify himself that he would issue him a citation and be on his way. Ms. Holland and Ms. Sokey advised Sergeant Dopke that the individual on the moped, whom they only knew as "Troy," had gone out the back door after putting on a shirt.

Sergeant Dopke authorized a canine track of the suspect by instructing Officer Bradley Kohn, a K-9 handler, to use KPD's German Shepard canine named "Deke." Deke is trained to bite and hold suspects. As Sergeant Dopke waited in the driveway of the residence, KPD Officers Bradley Kohn and Ryan Bonnalie and Benton County Deputy Jeff Quackenbush began tracking for the suspect using Deke.

During the track, Deke became free of his lead and after jumping through a hole in a fence made contact with Mr. Rogers, who had been sleeping in the backyard of a

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4. Failure to stop and driving with willful disregard for lives of property of others is a felony, R.C.W. § 46.61.024.

neighboring residence. Mr. Rogers was visiting his daughter, son-in-law, and grandchildren. Officers Kohn and Bonnalie and Deputy Quackenbush struck Mr. Rogers with fists, knees, and a flashlight, while Deke continued to "bite and hold" Mr. Rogers, until Mr. Rogers was subdued and handcuffed. Mr. Rogers was released after it was determined that he was not the driver of the moped that Sgt. Dopke had attempted to stop.

Sergeant Dopke resigned from the KPD on October 31, 2003, following notification that he was going to be reduced in rank as a result of the afore-mentioned events. Kenneth and Mary Lou Rogers filed suit and assert the following causes of action, arising out of Mr. Rogers' July 13, 2003, arrest: (1) trespass, (2) assault and battery, (3) unlawful imprisonment and/or false arrest, (4) negligence, (5) gross negligence, (6) wanton/willful misconduct, (7) intentional infliction of emotional distress, (8) negligent infliction of emotional distress, (9) outrage, (10) R.C.W. § 16.08.040 (strict liability), (11) violation of Washington State Constitution Article 1 § 7, and (12) Civil Right violations under 42 U.S.C. §§ 1983 & 1988.[5]

B. Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only

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5. Plaintiffs filed an Amended Complaint following the filing of the dispositive motion adding trespass and R.C.W. § 16.08.040 (dog bite statute) causes of action. As these causes of action were not addressed in Defendant Dopke's motion, the Court does not address these causes of action.

one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that there is an absence of disputed issues of material fact and that he is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56 (c). In other words, the moving party has the burden of showing that no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The court is to view the facts and draw inferences in the manner most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999).

A burden is also on the party opposing summary judgment to provide sufficient evidence supporting his claims to establish a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186 F.3d at 1213. "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the non[-]moving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477 U.S. at 249, 252).

C. Legal Analysis

Sergeant Dopke contends summary judgment in his favor is appropriate because (1) he did not instruct Officers Kohn

and Bonnalie and Deputy Quackenbush to conduct an "off leash" search, (2) he had no involvement in releasing Deke from his lead, and (3) he was not aware that Deke was off his lead until after Deke had contacted Mr. Rogers. Plaintiffs oppose the motion in its entirety.

1. Intentional Assault

Sgt. Dopke argues he could not have intentionally assaulted Mr. Rogers, as a matter of law, because he was not present when Deke bit Mr. Rogers or the other officers hit Mr. Rogers. Plaintiff submits Sgt. Dopke's physical proximity to the attack is irrelevant on the assault claim because Deke was an agent Sgt. Dopke used to commit the assault.

Assault is an intentional attempt to cause apprehension of imminent contact by the person alleging assault. *Orwick v. Fox,* 65 Wash. App. 71, 85 (1992); Restatement (Second) of Torts § 24. In Washington, the individual victimized by the assault need not be the individual whom the wrongdoer intended to assault. Washington law provides that "[o]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the means rea is transferred under R.C.W. 9A.36.011 to any unintended victim." *Wash. v. Wilson,* 125 Wash. 2d 212, 218 (1994). Thus, under R.C.W. § 9A.36.011, once the *meas rea* is established, the statute provides that an unintended victim is assaulted if the terms and conditions of the statute are met. *Id.* at 219; *see also* 6 Am. Jr. 2d, Assault and Battery § 98 & 99.

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The Court concludes it is a question of fact for the jury whether Sgt. Dopke intentionally assaulted Mr. Rogers. The jury can determine whether Sgt. Dopke intended, through the use of Deke, for an individual, i.e. the suspect, to suffer great bodily harm. If the jury answers this question affirmatively, then the *means rea* is established. However, initially, the jury will need to determine whether the level of force used by Sgt. Dopke exceeded that which was objectively reasonable under the circumstances. *See Ramirez v. City of Reno,* 925 F. Supp. 681, 691 (D. Nev. 1996). If the jury finds the use of force was objectively reasonable, the assault claim must fail because the contact was lawful. *See McKinney v. City of Tukwila,* 103 Wash. App. 391, 408-09 (2000). Accordingly, the Court denies in part Defendant Dopke's motion.

2. Negligent Infliction of Emotional Distress

Next, Sgt. Dopke contends Plaintiffs cannot establish an existence of a duty owed by Sgt. Dopke to Mr. Rogers or that Sgt. Dopke's authorization of Deke to track an allegedly fleeing suspect breached any alleged duty owed. Plaintiff argues Sgt. Dopke is liable for negligent infliction of emotional distress because it was foreseeable for Deke to bite an innocent bystander, citing to Kennewick's ordinances requiring a police dog to be attended to where it could potentially make contact with the public and/or injure anyone and prohibiting a pursuit where the initial wrongdoing was an infraction.

To prove negligent infliction of emotional distress, a plaintiff must establish duty, breach, proximate cause, and

injury. *Snyder v. Med. Serv. Corp. of E.W.*, 98 Wash. App. 315 (1999). In regards to injury, the plaintiff must prove that he has suffered emotional distress by objective symptomatology and the emotional distress is susceptible to medical diagnosis and proved through medical evidence. *Kloepfel v. Bokor,* 149 Wash. 2d 192 (2003). The Court finds a question of fact exists for the jury as to whether it was reasonably foreseeable for Deke to bite an individual besides the suspect, especially in light of the Kennewick ordinance requiring that dogs be attended to and the possibility that the canine handler would take Deke off his lead. Accordingly, the Court denies in part Defendant Dopke's motion.

3. Outrage

Sgt. Dopke argues his decision to authorize the use of Deke to track an allegedly fleeing suspect was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Plaintiff submits the jury should decide whether Sgt. Dopke's direction to use Deke off leash in a residential neighborhood at night to pursue an illegal moped driver is outrageous.

The elements of the tort of outrage are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Birklid v. Boeing Co.,* 127 Wash. 2d 853, 867 (1995). The Court finds the jury should determine whether Sgt. Dopke's authorization of the use of Deke in a residential neighborhood at night to search for an individual who initially committed a civil infraction and was not deemed

to be a danger to the officers or public was outrageous and extreme. Accordingly, the Court denies in part Defendant Dopke's motion.

4. False Arrest

Sgt. Dopke submits Plaintiffs cannot prove Sgt. Dopke unlawfully restrained Mr. Rogers. Plaintiffs argue Sgt. Dopke is liable for false arrest because he used Deke and the K-9 Unit to unlawfully restrain Mr. Rogers and, thus, Sgt. Dopke procured or instigated the arrest without probable cause.

A false arrest is only committed by one who has legal authority to arrest or who pretended to have legal authority to arrest. *Bender v. City of Seattle,* 99 Wash. 2d 582, 590-91 (1983). The Washington Supreme Court has advised that a false arrest occurs when:

> A person is restrained or imprisoned when one is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

Id. at 591 (quoting *Kilcup v. McManus,* 64 Wash. 2d 771, 777 (1964)). In *Bender,* the Washington Supreme Court noted:

> one may be liable for false arrest or false imprisonment even if he or she is not the person who physically restrains the plaintiff:

> One who participates in an unlawful arrest, or procures or instigates the making of one without proper authority, will be liable for the consequences; but the defendant must have taken some active part in bringing about the unlawful arrest itself, by some "affirmative direction, persuasion, request or voluntary participation."

Id. at *592* (quoting W. Prosser, *Torts* § 11, p. 47 (4th ed. 1971).

The Court concludes Plaintiffs presented sufficient evidence to create a genuine issue of material fact as to whether Sgt. Dopke procured or instigated the false arrest. However, the jury will need to first determine whether Officers Kohn and Bonnalie and Deputy Quackenbush conducted an unlawful arrest and then decide whether Sgt. Dopke's decision to authorize the use of Deke procured Mr. Rogers' arrest. Accordingly, the Court denies Defendant Dopke's motion in part.

5. Washington State Constitution Art. 1 § 7

Sgt. Dopke submits he did not search or seize Mr. Rogers and, thus, Plaintiffs' claim for an alleged violation of Article 1 § 7 of the Washington Constitution should be dismissed. Plaintiff contends Sgt. Dopke arrested Mr. Rogers without probable cause in violation of Article 1 § 7 of the Washington Constitution by directing the K-9 unit to track and apprehend.

Appendix B

Article 1 § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section provides "protection for the citizens of Washington which are qualitatively different from, and in some cases broader than those provided by the Fourth Amendment." *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 803-04 (9th Cir. 2001) (quoting *City of Seattle v. McReady,* 868 P.2d 260 (1994)). To determine whether this constitutional provision has been violated the inquiry is "whether the State has unreasonably intruded into a person's private affairs." *Id.* 804 n.6. (quoting *Wash. v. Young,* 123 Wash. 2d 173 (1994)). A search without a warrant is presumptively unreasonable. *Wash. v. Bessette,* 105 Wash. App. 793, 797-98 (2001). However, a warrantless search is allowed during exigent circumstances such as: hot pursuit, fleeing suspect, danger to arresting officer or the public, mobility of vehicle, and mobility or destruction of the evidence; and the court is to weigh the following factors: (1) a grave offense (crime of violence), (2) a suspect who is reasonably believed to be armed, (3) trustworthy information that the suspect is guilty, (4) strong reason to believe that the suspect is on the premises, (5) likelihood of escape if the suspect is not swiftly apprehended, and (6) entry can be made peaceably. *Id.* at 798.

Plaintiffs compare an arrest in a fenced backyard to a warrantless arrest in a house because the fenced yard was part of the curtilage. *United States v. Dunn,* 480 U.S. 294, 301 (1987). The Court agrees that generally a warrant is required before an arrest of an individual in a fenced yard can be conducted, absent exigent circumstances. Here, the suspect was fleeing; yet, the offense was not a grave offense

and there was no reason to believe that he was armed or dangerous. Because the suspect was reported to have fled on foot, Sgt. Dopke could reasonably believe the suspect was nearby, however, there was no evidence that entry into this backyard could not have been made peaceably or that a verbal warning regarding the use of a police dog could not be used, or even a verbal warning that the dog was being taken off the leash. Thus, the Court finds triable issues of fact exist as to whether the state unreasonably intruded into Mr. Roger's private affairs when Deke entered the fenced backyard unannounced and whether Sgt. Dopke was a cause of this intrusion.

For the above reasons, **IT IS HEREBY ORDERED:** Defendant Dopke's Motion for Summary Judgment, **(Ct. Rec. 27)**, is **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to:

(A) Enter this Order; and

(B) Provide copies to the parties.

DATED this 21st day of March, 2005

s/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON DATED MARCH 21, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CV-04-5028-EFS

KEN AND MARY LOU ROGERS,

Plaintiffs,

v.

CITY OF KENNEWICK, a municipal corporation, BENTON COUNTY, WASHINGTON, a political subdivision in the State of Washington, RICHARD AND JANE DOE DOPKE, husband and wife, individually and as a marital community, JOHN DOE AND JANE DOE BONNALIE, R.B. KOHN AND JANE DOE KOHN, JOHN DOE QUACKENBUSH AND JANE DOE QUACKENBUSH,

Defendants.

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT DOPKE'S MOTION FOR RECONSIDERATION

A hearing was held in the above-captioned matter on March 8, 2005. The Plaintiffs Ken and Mary Lou Rogers were represented by Diehl Rettig. Michael McFarland appeared telephonically on behalf of Richard and Jane Doe

Dopke, and Jerry Morberg appeared on behalf of the other Defendants. Before the Court was the Defendants' Motion for Summary Judgment, (Ct. Rec. 53). Also, before the Court, without oral argument, is Defendant Dopke's Motion for Reconsideration, (Ct. Rec. 74), of the Court's Order Denying Defendant Dopke's Motion for Summary Judgment, (Ct. Rec. 58). After reviewing the submitted material and relevant statutory and case law, and taking oral argument, the Court was fully informed. The Court grants in part the Defendants' motion (dismissing Kennewick and Benton County as to the 42 U.S.C. § 1983 and outrage causes of action), but denies the Defendants' motion in all other aspects. In addition, the Court grants Defendant Dopkes' reconsideration motion; the Court replaces its previous 42 U.S.C. § 1983 and qualified immunity analysis; however, the Court stands by its previous conclusions in regards to all of the causes of action as they relate to Defendant Dopke.

A. Facts[1]

During the early morning of July 13, 2003, at approximately 12:55 a.m. while on duty with the Kennewick Police Department (KPD), Sergeant Richard Dopke observed a shirtless man riding a "mini-moped" without lights and without a helmet, both of which are civil infractions, on Canal Drive. Sergeant Dopke radioed dispatch and activated his overhead lights and video camera to effect a traffic stop, but the moped continued traveling at or below the speed limit

1. At the motion for summary judgment stage, the Court must view the facts and draw inferences in a manner most favorable to Plaintiff.

turning onto Kellogg and then Umatilla.[2] Sergeant Dopke activated his siren and followed the moped another block, where the driver turned into the driveway of the residence located at 6902 W. Umatilla.[3] The man drove directly into the garage, at which time a woman closed the garage door behind him.

Sergeant Dopke called for backup units. After the arrival of another officer,[4] Sergeant Dopke and this officer made contact with two women, Tara Holland and Pam Sokey, who exited the residence and approached the officers standing in the driveway. Sergeant Dopke told the women that if the person driving the mini-moped would simply identify himself that he would issue him a citation and be on his way. Ms. Holland and Ms. Sokey advised Sergeant Dopke that they had let the individual, whom they only knew as "Troy," use the moped and that Troy had gone out the back door after putting on a shirt. Sergeant Dopke asked the women for permission to search the house for the individual. The women returned to the house and spoke to the individuals inside. Upon returning outside, the women advised the officers they could search the house for Troy. Sergeant Dopke

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2. Willfully failing to stop a motor vehicle when signaled to do so by a police officer is a misdemeanor, R.C.W. § 46.61.022.

3. Sgt. Dopke activated the videocamera in his police car. Accordingly, there is an approximately twenty-five minute videotape of the moped and the outside of the residence.

4. The Court is unsure on this record whether the officer that arrived was Officer Kohn, Officer Bonnalie, Deputy Quackenbush, or another officer.

and the other officer accompanied the women inside where they met two men inside.[5] The officers searched the house and reportedly did not find the suspect.

Even though Sergeant Dopke did not believe the story that these individuals did not know more information about "Troy," Sergeant Dopke authorized a canine track of the suspect by instructing Officer Bradley Kohn, a K-9 handler, to use KPD's German Shepard canine, Deke. Officer Kohn testified he was instructed that Deke was to track and apprehend the suspect. Deke is trained to bite and hold suspects and has been known to Sgt. Dopke and the other law enforcement officers to have caused physical harm to suspects in previous police applications. Officer Kohn took Deke to the backyard to obtain a "scent." As Sergeant Dopke waited in the driveway of the residence, KPD Officers Kohn and Ryan Bonnalie and Benton County Deputy Jeff Quackenbush began tracking the neighborhood for the suspect using Deke.

At the driveway of 6911 West Victor, Deke expressed interest. The backyard of this residence borders the backyard of 6902 W. Umatilla, the residence Troy had last been seen driving the moped into the garage. Within this driveway, a boat with a trailer, enclosed utility trailer, and a mini-van were parked. There is conflicting testimony as to whether within this driveway Deke's lead became stuck on the hitch of a boat trailer or whether Officer Kohn decided to unleash Deke prior to any tangling of the leash. Officer Kohn believed

5. It was later discovered that the individual who had been riding the mini-moped was one of the men inside the residence and his name was not "Troy."

that Troy may be in or under the vehicles in the driveway. This gravel parking area was open on three sides, with a fence on the fourth side near the house.[6] Officer Kohn stood on one side of the driveway so he could view Deke if he left the driveway area. Within seconds of unleashing Deke, Officer Kohn heard a yell from the unlit backyard and ran to the fence to investigate. Officer Kohn either looked through or over the fence and with the use of flashlight saw Deke biting a suspect, who was later discovered to be Ken Rogers, age 50, a salesman with Georgia Pacific, who had been sleeping in the backyard of his daughter and son-in-law's property. Officer Kohn stated he advised, "Kennewick Police K-9 unit, stop fighting the dog and I will release him." Officer Kohn reports he then saw Mr. Rogers look at him and then start punching Deke with his right fist. Officer Kohn and Officer Bonnalie removed fence boards in order to enter the backyard. Officers Kohn and Bonnalie and Deputy Quackenbush struck Mr. Rogers with fists, knees, and a Mac flashlight, while Deke continued to attack, until Mr. Rogers was subdued and handcuffed.

Mr. Rogers' version of the events differs. Mr. Rogers remembers:

> . . . hear[ing] someone or something near the side gate I had entered through several hours earlier. As I listened and looked toward the noise I saw a flicking of light through the fence. Parked near the side gate are a boat and a box utility trailer. I

6. Defendants characterize this driveway as "confined," however, when viewing the facts in the light most favorable to the Court, the Court does not find this characterization apt.

had backed my Van up close to the utility trailer, where I parked earlier, I thought that someone was attempting to break into the Van, box utility trailer and/or boat. I jumped up and with authority, volume and clarity yelled, "Hey, what's going on?" I did not have time to put on my glasses when I jumped by reacting to the sound and flicking light through the fence. I was sure this would scare off someone if they were up to no good and felt safe because I was on the other side of the fence. The gate can't be opened from the outside [sic] the latch is on the backyard side and the gate has to be slightly lifted to unlatch the lock. I was about 10 feet from the gate. There was no verbal response of any kind to my question. There was no light flashed in my direction.

At this moment I felt a brief sense of relief. However, abruptly (2-3 seconds) that all changed when I was attacked by a large furious dog. I did not see the dog in the dark until the last moment as it was lunging at my throat. The dog clamped its jaws on my left arm as I reacted to his lunge at my throat. I was able to tear the dog away briefly by grabbing the top of his mouth (it had a [sic] elongated muzzle), but he came right back at me and again was biting down on my arm. This time the dog bit well through my jacket and sunk its teeth deep into the flesh of my arm. During the struggle with the unknown dog, I was spun 180 degrees, stumbling trying to gain my equilibrium and balance. My focus was entirely on getting the dog off my arm.

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At this point I heard the fence and/or gate being kicked down. I began yelling and screaming loudly knowing I had to get free from the dog. My back was now to the gate and fence, I could not see what was coming. I was then blindsided with several blows from what felt like fists and baseball bats to my head, sides of my face, back and lower back. I was then driven into the ground as I was already collapsing from multiple blows. I was sure a group of prowlers had turned their dog on me and I was in the process of being beaten, kicked and bitten on my upper arm and neck by the dog. My bare legs were cut and bleeding. I could feel and taste the blood coming from my face and head wounds. I was sure the only punishment left was to get stabbed by a knife or shot by a gun. I was completely overwhelmed and was defenseless. I was in extreme fear of my life.

The attack somewhat subsided. This allowed me to try and assess what was happening. I was face down on the ground and for the first time was able to move my head enough to see black boots, or shoes, and black pants of one of the attackers. I continued to move my eyes up the dark form standing nearest to my head. I saw a silvery object on the assailant's jacket that appeared to be a badge of some sort. I was beaten, bleeding, in excruciating pain and did not have my eyeglasses. I was not sure who was attacking me. Helplessly, I could only say to myself, "Oh my God, Oh my God."

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> At this point I was handcuffed sharply with my arms behind my back and yanked to a slumped standing position. My back was starting to spasm from the blows I received there.
>
> This was the first time I actually saw that there were several men. Many were in police uniform. I was asking, "What is going on?" There was no direct response to me but background talk that referred to the fact that "We got him!" I stated that they had the wrong person, that I was sleeping on the cushions and that this was my stepson's house.

(Rogers Aff. Exhibit 1.)

Following arrest, Ken Rogers, hurt and bleeding, was handcuffed and placed in a police car where he was kept for approximately forty-five minutes to an hour, without receiving medical help or attention, while the officers determined if Mr. Rogers was who he said he was. Upon transport to the hospital, Mr. Rogers was not given assistance or help. Mr. Rogers sustained injuries to his head, arms, back, neck, and legs. He was bitten, punctured, cut, and bruised. Mr. Rogers experienced some permanent hearing loss, scarring on the side of his head, ankle, knee, left hand, left forearm, and left elbow. He has nerve damage to his left hand, and continues to experience pain and disability in his back. Emotionally, Mr. Rogers was significantly traumatized and suffers from chronic post traumatic stress disorder or an anxiety disorder.

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Kenneth and Mary Lou Rogers filed suit and assert the following causes of action, arising out of Mr. Rogers' July 13, 2003, arrest: (1) trespass, (2) assault and battery, (3) unlawful imprisonment and/or false arrest, (4) negligence, (5) gross negligence, (6) wanton/willful misconduct, (7) intentional infliction of emotional distress, (8) negligent infliction of emotional distress, (9) outrage, (10) violation of Washington's strict liability dog bite statute, R.C.W. § 16.08.040, (11) violation of Washington State Constitution Article 1 § 7, and (12) violation of the Civil Rights Act, 42 U.S.C. §§ 1983 & 1988.

B. Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that there is an absence of disputed issues of material fact and that he is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c). In other words, the moving party has the burden of showing that no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The court is to view the facts and draw inferences in the manner most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999).

A burden is also on the party opposing summary judgment to provide sufficient evidence supporting his claims to establish a genuine issue of material fact for trial. *Anderson,* 477 U.S. at 252; *Chaffin, 186* F.3d at 1213. "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the non[-]moving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City & County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson, 477* U.S. at 249, 252).

C. Legal Analysis

1. 42 U.S.C. § 1983 and Qualified Immunity[7]

Section 1983 is a remedial statute which provides an avenue of redress to persons injured by the actions of government which violate federal constitutional rights. The statute states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

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7. It is in regard to this cause of action that Defendant Dopke correctly points out the Court erred in the previous order Denying Defendant Dopke's Motion for Summary Judgment, (Ct. Rec. 63). The Court enters this Order in part to correct its previous § 1983 and qualified immunity analysis; however, the Court maintains its previous conclusion, denying Defendant Dopke's motion. In addition, the Court will enter an Amended Order Denying Defendant Dopke's Motion for Summary Judgment, which addresses the state law claims.

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The Ninth Circuit recently clarified the analysis to be utilized when addressing a qualified immunity defense in connection with a § 1983 cause of action. The analysis is composed of two legal questions:

> The first is whether [the officer's] actions violated the Plaintiffs' constitutional rights. We must consider whether, " [t] aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*
>
> The second question is, assuming Defendants' actions violated the Plaintiffs' constitutional rights, whether those rights were so "clearly established," *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), that "in the light of pre-existing law the unlawfulness [of the challenged action was] apparent," *Anderson v. Creighton,* 483 U.S. 635, 640 (1987), and the officers should answer in tort. The officers are immune unless "the law clearly

> proscribed the actions" taken. *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985). Accordingly, qualified immunity protects those officials "who are required to exercise their discretion," *Butz v. Economous,* 438 U.S. 478, 506 (1978), and who "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis v. Scherer,* 468 U.S. 183, 196 (1984).

Meyers v. Redwood City, 2005 WL 553148 (9th Cir. 2005).

a. Constitutional Right

Accordingly, the first question is whether, when the facts are taken in the light most favorable to Plaintiffs and the inferences are drawn in their favor as well, these facts and inferences establish that the officers, while acting under color of law, engaged in conduct violating a constitutional right. It appears there is no dispute the officers were acting under color of law when they authorized the canine search. Therefore, the inquiry is focused on Plaintiffs' allegations that the following officer conduct deprived Mr. Rogers of a constitutional right: (1) improperly deploying Deke, a dog trained to bite and hold, to search for a person seeking to avoid traffic citations, who was not reported to be armed or dangerous, in a residential neighborhood at night after "sensitizing" Deke to the backyard of a residence, where the person might have gone after leaving the garage, (2) unleashing Deke in a driveway without an announcement after Deke had indicated "interest," (3) delay in calling off Deke after he went into a fenced backyard without probable

cause, (4) the officers' use of physical force to subdue Mr. Rogers while Deke was still biting, and (5) delay in providing Mr. Rogers with medical aid when the officers knew he was severely physically injured.

Other than the medical aid claim, Plaintiffs' claims regard the use of excessive force. "Where . . . the excessive force claim arises in the context of an arrest . . . of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures of the person.'" *Graham v. Connor,* 490 U.S. 386, 394 (1989). The "reasonableness" analysis requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances." *Graham,* 490 U.S. at 396. In balancing these interests, the following factors are utilized: (1) severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight, and (4) any other exigent circumstances that existed at time of arrest. *Deorle v. Rutherford,* 272 F.3d 1272 (9th Cir. 2001) (citing *Graham,* 109 S. Ct. at 1872). These "factors articulated in *Graham,* and other factors bearing on the reasonableness of a particular application of force, are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure . . . ," *Smith v. City of Hemet,* 394 F.3d 689, 701 (9th Cir. 2005) (quoting *Chew,* 27 F.3d at 1441), with the central inquiry being whether the search or seizure was objectively reasonable in light of all of the circumstances surrounding the encounter. *Id.*

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The Court finds the level of force used constitutes force on the "higher end" of the force continuum, or as the Kennewick Municipal Code ("K.M.C.") categorizes it, a "serious injuring force." As the Ninth Circuit emphasized in *Smith v. City of Hemet,* the determination of what force a police canine constitutes is determined on a case specific basis. Smith, 394 F.3d 689. Plaintiffs concede the use of Deke was not "deadly force, and the Court agrees the use of Deke and the physical blows utilized by the officers did not constitute deadly force; however, such constitutes "serious injuring force." *See id.; Quintanilla v. City of Downey*, 117 S. Ct. 972 (1997); *Jarrett v. Town of Yarmouth,* 331 F.3d 140 (1st Cir. 2003); *Case v. Smith,* 831 F.2d 1057 (4th Cir. 1987).

The first "force" applied by the officers was the determination that Deke, a trained "bite and hold" police canine, should be used to search for the suspect. Deke was utilized and then released off of his lead. Thereafter, Deke found Mr. Rogers and bit him. While Deke was "holding" Mr. Rogers, the officers kneed, punched, and struck Mr. Rogers with a flashlight. As a result of this encounter with law enforcement, Mr. Rogers received stitches to his face and arm, an injured back, neck and left knee, lost feeling in his left hand, and loss of hearing in his left ear. Accordingly, the Court finds the amount of force used was severe.

The first *Graham* factor asks the Court to view this severe force in light of the severity of the crime. The suspect "Troy" initially committed civil infractions, *i.e.* operating a moped without lights and without a helmet. Then, by failing to stop when signaled to do so by a police officer, Troy arguably committed a misdemeanor. The Court finds the

severity of the crimes minimal. These crimes are especially minimal when compared with the crimes and circumstances confronting the officers in other cases in which a police canine trained to bite and hold was used to track and apprehend a suspect: *Miller v. Clark County,* 340 F.3d 959, 962-64 (9th Cir. 2003) (driving reportedly stolen vehicle); *Mendoza v. Block,* 27 F.3d. 1357 (9th Cir. 1994) (armed robbery suspect); and *Robinette v. Barnes,* 854 F.2d 909, 912-13 (6th Cir. 1988) (burglary suspect).

The most similar case cited to by the parties was *Matthew v. Jones,* 35 F.3d 1046 (6th Cir. 1994). However, the civil infractions and misdemeanor committed by "Troy," are still minimal in relation to the driver's conduct in *Matthews.* The officer in Matthews witnessed the driver speeding and driving recklessly, all while driving with a suspended license. The suspect then fled into the woods after the officer attempted to pull the vehicle over. The officer was also concerned that the driver in *Matthews was* armed; whereas, the officers conduct on the evening of July 13, 2003, did not evidence a concern that "Troy" was armed or dangerous.

In addition to the civil infractions and misdemeanor, Defendants contend that the suspect, now Mr. Rogers, was committing the felonies of attacking a police dog and resisting arrest. As is explained further below, the Court finds the Defendants potentially cannot rely on such alleged offenses to justify their behavior following Deke's entry into the fenced backyard in connection with the 42 U.S.C. § 1983 cause of action. Mr. Rogers maintains he did not hear the officers state that they were police officers or that Deke was a police dog while they were striking him. When Deke entered

the backyard, neither a warrant nor probable cause with exigent circumstances existed; Defendants do not contest that a dog's "detection" does not equate to probable cause. As the backyard was fenced, it was part of the curtilage and Mr. Rogers, as an overnight guest, had a privacy right. Therefore, it is a question for the jury whether probable cause and exigent circumstances existed, allowing the warrantless entry by Deke and the officers; if probable cause and/or exigent circumstances were not present then the officers cannot rely on the violation of R.C.W. § 9A.76.200, assaulting a police dog, or the crime of resisting arrest because law enforcement were not lawfully in the backyard.

Second, it is necessary to assess the immediate threat Troy posed to the safety of the officers and others. There is no evidence that Troy was armed. The videotape of the incident shows that the officers' contact with the occupants of the residence was peaceful. The officers did not draw their weapons. Furthermore, after both Sgt. Dopke and the unidentified officer entered the house initially, the unidentified officer left the residence approximately five minutes later and walked around the perimeter of the residence leaving Sgt. Dopke inside. This indicates both officers were not concerned for their safety. Sgt. Dopke even admitted that he questioned whether Troy had left the premises. Furthermore, there is no evidence that this was an unsafe neighborhood or that Troy posed a threat to others in the neighborhood. In fact, Sgt. Dopke even commented to the unidentified officer that Troy likely lived nearby. Therefore, these officers recognized that Troy was not a safety risk to the neighborhood or to the officers.

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The third factor, whether the suspect was actively resisting arrest or attempting to evade arrest by flight, weighs in favor of the Defendants. First, "Troy" evaded receiving citations by not stopping when signaled to do so by Sgt. Dopke, pulled into a garage, and then reportedly left the residence. Next, the "suspect," now Mr. Rogers, was seen beating Deke and, per the officers' testimony, physically resisting arrest. Yet, Mr. Rogers maintains that he did not hear the officers inform him that Deke was a police dog or that the men were police officers. Therefore, if the facts are viewed in Plaintiffs' favor, there is no evidence that Mr. Rogers resisted arrest or beat a police dog as he was unaware that they were law enforcement and he believed he was acting in self defense. Accordingly, the only evidence in regards to this third factor, was that "Troy" evaded citations.

After weighing the above factors in light of the force utilized and the facts taken in the light most favorable to Plaintiffs and the inferences are drawn in their favor as well, the Court finds a genuine issue of material fact exists as to whether the officers' conduct violated Mr. Rogers' right to be free from unreasonable search and seizure, *i.e.* whether the circumstances justified the amount of force used. In addition, the Court finds a triable issue of fact exists as to whether the officers' conduct violated Mr. Rogers' constitutional due process right to have prompt medical treatment. Accordingly, the Defendants' motion is denied in part.

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b. Clearly Established

Defendants argue, regardless of whether a genuine issue of material fact exists as to whether their conduct violated Mr. Rogers' constitutional rights, they are entitled to qualified immunity because their conduct did not violate clearly established statutory or constitutional rights. *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Conn v. Gabbert,* 526 U.S. 286, 290 (1999); *Diruzza v. County of Tehama,* 206 F.3d 1304 (9th Cir. 2000); *Thompson v. Souza,* 111 F.3d 694, 698 (9th Cir. 1997). The defense of qualified immunity has been extended to police officers. *Harris v. City of Roseburg,* 664 F.2d 1121, 1127 (9th Cir. 1981).

A law is clearly established if "a reasonable official would understand that what he is doing violates that right," *Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir. 1998); in other words, government officials are insulated from liability unless they are "plainly incompetent" or "knowingly violate the law." *Know v. S.W. Airlines,* 124 F.3d 1103, 1007 (9th Cir. 1997). This law must be clearly established at the time of defendant's acts. *Conn v. Gabbert,* 526 U.S. 286, 290 (1999); *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir. 1994). The Supreme Court indicated a certain degree of predictability is required:

> It is important to emphasize that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." As we previously said in this very context:
>
> > [T]here is no doubt that *Graham v. Connor, supra,* clearly establishes the

> general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet, this is not enough. Rather, we emphasized in *Anderson [v. Creighton,]* that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' The relevant, dispositve inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Brosseau v. Haugen, 125 S. Ct. 596, 599 (2004) (citations omitted). Yet, "if the defendants' conduct is so patently violative of the constitutional right that reasonable officials

would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing caselaw is not required to show that the law is clearly establish." *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Casteel v. Pieschek, 3* F.3d 1050, 1053 (7th Cir. 1993)). In addition to looking at case law to determine whether the law governing conduct is clearly established, statutory and administrative procedures also serve as law. *See Babcock v. Wash.,* 116 Wash. 2d 596, 618-19 (1991).

Due to the particularity requirement, the Court analyzes Plaintiffs' claimed constitutional violations individually to determine whether the law governing such conduct was clearly established. The Court notes the issues do not concern Deke's ability to follow commands, Deke's training, or Deke's conduct as a police dog; rather, this case is about, in part, whether the use of Deke and the commands, and or lack of commands, given to Deke violated Mr. Rogers' constitutional rights.

i. Track and Apprehend (Sgt. Dopke and Officer Kohn)

The first officer conduct was the decision to utilize Deke to "track and apprehend." Previously, in the Court's Order Denying Defendant Dopke's Motion for Summary Judgment, the Court found, "the law on June 13, 2003, clearly established that the unreasonable deployment of a police dog was unlawful" and "a triable issue of fact exists as to whether a reasonable officer would believe that the authorization of the use of Deke to track the suspect, who had eluded Sgt. Dopke after committing a civil infraction but was not

believed to be dangerous, in a Kennewick residential neighborhood at night was reasonable." The Court amends the previous Order's § 1983 and qualified immunity analysis, and the following serves as the Court's analysis and conclusion in regards to both Sgt. Dopke's motion and the other Defendants' motion as they relate to question of whether the law governing the officers' conduct was clearly established.

The legal question before the Court is whether as of July 13, 2003, the law clearly established that it was unlawful to utilize a police canine to track and hold a fleeing misdemeanant and civil infractant in a residential neighborhood at night when the suspect was not reported to be armed or dangerous after sensitizing the police canine to a location which the officers questioned whether the suspect had even been, when a more reliable "sensitizing" item, *i.e.* the mini-moped, was available. Neither party cited a case that involved the use of a police dog to track and hold a suspect of civil infractions that did not have outstanding felony warrants or other suspicious conduct in a residential neighborhood.

The two most somewhat similar cases are *Chew v. Gates,* 27 F.3d 1432 (9th Cir. 1994), and Matthew *v. Jones,* 35 F.3d 1046 (6th Cir. 1994). In *Chew,* the Ninth Circuit ruled that, as of September 1988, it was not clearly established that the use of dogs to seize fleeing or hiding suspects was unconstitutional. This ruling, taken broadly, appears to support a finding that as of July 2003 it was not clearly established that the use of a police dog to seize a fleeing unarmed misdemeanant at night in a residential neighborhood

was unconstitutional. However, as Defendants highlight, the question of whether the law governing the conduct is clearly established is a particularized analysis based on the circumstances of the case. The suspect in *Chew,* although initially stopped for a traffic violation, also had outstanding felony warrants and was possibly armed. Whereas, here, the officers did not believe "Troy" was armed or that he had any outstanding felony warrants. Furthermore, Sgt. Dopke told the fellow officer that he did not believe the residents' story that Troy fled out the backyard; yet, Deke was taken to the backyard in order to be sensitized, rather than to the moped. The risk of obtaining a mistaken "scent" was greater here as compared to *Chew.*

As briefly discussed above, *Matthew v. Jones* involved the pursuit of an individual who left a vehicle and ran into nearby dense woods after being pursued for speeding, reckless driving, and driving without a license by a marked police vehicle. The Sixth Circuit did not specifically address whether the law governing the officer's authorization of the use of a police canine to track and apprehend this suspect was clearly established. Regardless, the Court finds the facts *of Matthew* distinguishable as the officer in *Matthew* had reason to believe the suspect was dangerous and the suspect eluded into woods; whereas, here, the officers did not believe that Troy was dangerous and the search was conducted in a residential neighborhood, where the risk of Deke becoming "sensitized" to the scent of an innocent individual was greater.

Defendants also point to *Dernen v. City of Duluth,* 350 F.3d 786 (8th Cir. 2003), for the proposition that the case law did not clearly establish that the use of a police dog to

track and apprehend a suspect of a minor crime was unconstitutional. The Eight Circuit in *Dennen v. City of Duluth,* 350 F.3d 786 (8th Cir. 2003), ruled that it is not *per se* excessive force to use a canine without a leash, noting that there are a variety of instances when it would not be appropriate to have a canine on a leash. *Dennen* is distinguishable from the case at hand. The officer in *Dennen* never gave a command to the canine to track or apprehend the individual. The officer walked at night in an area of town known for some rowdiness and criminal activity, with his canine off-leash, because the officer was unsure where the individual was and was concerned for his safety after he had observed the suspect eluding the officer, holding a strange object, and making furtive movements. For the simple reason the canine in *Dennen* was not given a command to track or apprehend, *Dennen* is distinguishable from the case before the Court.

Mason v. Hamilton County, 13 F. Supp. 2d 829 (S.D. Ind. 1998), was also brought to the Court's attention. In *Mason,* the suspect was attempting to unlawfully enter an outdoor Grateful Dead concert by climbing over a fence when the officer released the canine in order to apprehend the apparently unarmed suspect after determining that the officer would be unable to reach the suspect in time before he crossed the fence. Prior to releasing the dog, the officer gave the suspect a verbal warning. The court discussed that it likely would have found the officer's conduct unreasonable, however, the court determined that it could not find the jury's decision that the officer's conduct was reasonable irrational. However, the Court took the opportunity to note that it did not "mean to imply that such issues could never be decided

as a matter of law against a police officer . . . [I]t might well be unreasonable as a matter of law to order a dog to attack a person who appears to be guilty of nothing worse than loitering, for example." *Id.* at 837 n.4.

After analyzing the case law and the facts of this case, the Court finds the circumstances facing the officers were more similar to the Ninth Circuit's notation in *Mendoza v. Block,* 27 F.3d 1357 (9th Cir. 1994): "no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." The Court finds a reasonable officer, on July 13, 2003, would understand that the law clearly established that it was unlawful to utilize a police canine to track and hold a fleeing misdemeanant and civil infractant in a residential neighborhood at night when the suspect was not reported to be armed or dangerous after sensitizing the police canine to a location where the suspect's presence was uncertain, if not unlikely, rather than the moped. *See Priester v. City of Riviera Beach, Fla.,* 208 F.3d 919 (11th Cir. 2000); Vathekan *v. Prince George's County,* 154 F.3d 173 (4th Cir. 1998). The potential for seriously injuring an innocent bystander was too great to justify such a search. Furthermore, a reasonable officer in this position would have known Kennewick Municipal Code § 26.2.6.02 specifically provided that "officers will not maintain a pursuit wherein the initial violation is an infraction or misdemeanor and the pursuit occurred as a result of that infraction or misdemeanor." This policy is consistent with the Fourth Amendment's requirement of balancing the nature and quality of the

intrusion with the countervailing governmental interests at stake. For these reasons, Defendants' motion is denied in part.

ii. Unleashing of Deke without Verbal Warning (Officer Kohn)

The second officer decision challenged by Plaintiffs is Officer Kohn's decision to unleash Deke without providing an oral warning. Defendants propose the question is whether an officer would reasonably know that it was a violation of the Plaintiff's Fourth Amendment rights to unleash the police dog in a confined area so that his lead could be untangled. However, this proposed question fails to recognize that, under Plaintiffs' version of the facts, Officer Kohn made an intentional decision to release Deke prior to entanglement in a driveway that was unfenced on three sides. Thus, the Court finds the proper question is whether the law clearly established at the time of this incident that it would be unlawful to unleash a police canine in a residential setting at night without providing an oral warning.

Defendants concede the case law at the time of the incident required a dog handler to give a suspect, who was hiding in a confined building, a verbal warning prior to release of the dog. The Court determines the case law regarding verbal warnings prior to release of a canine was not limited to a confined building; further, the Court finds the case law as of July 13, 2003, clearly established that a verbal warning was to be given prior to the release of a canine, absent officer safety concerns, when there was a potential for the canine to contact an innocent bystander. *See Vathekan*

v. Prince George's County, 154 F.3d 173 (4th Cir. 1998) (ruling that canine handler should have provided a warning before releasing dog into duplex during search for a burglar); *see also Miller v. Clark County,* 340 F.3d 959, 962-64 (9th Cir. 2003) (during night pursuit of an individual, who was known to not be "law enforcement friendly," and had been driving a reportedly stolen vehicle, officer yelled at edge of wooded terrain that a police dog would be released if the individual did not show himself); *Mendoza v. Block,* 27 F.3d. 1357 (9th Cir. 1994) (giving armed robbery suspect hiding in bushes approximately twenty announcements from a helicopter that a canine dog would be deployed, prior to the release of the canine in the area of the bushes in which the suspect was hiding); *Matthew v. Jones,* 35 F.3d 1046 (6th Cir. 1994); *Robinette v. Barnes,* 854 F.2d 909, 912-13 (6th Cir. 1988).

Defendants cite to the Eighth Circuit decision *Kuha v. City of Minnetonka,* 365 F.3d 590 (8th Cir. 2004), which was decided a year after this incident. *Kuha,* on the facts, is inapposite. The Eighth Circuit did decide that, as of September 1999, the case law did not establish a suspect had a right to a verbal warning prior to a police dog being utilized under the circumstances of that case. However, the Eighth Circuit entered this ruling largely because "[a]n officer could conclude, as Officer Anderson testified in this case, that in situations where the location of the suspect is less evident, a warning would place the officers at undue risk from a hiding suspect." *Id.* at 602-603.

That is simply not this case. In addition, the Court disagrees with the Eighth Circuit's interpretation of the

Fourth Circuit cases; and the Court notes again that the Defendants conceded the case law required an officer to give a verbal warning before releasing a canine into a building. The Court finds the case law clearly established that when there was reason to believe the suspect was nearby or in a confined area, and there was no concern for officer safety, but there was potential for the canine to injure an innocent bystander, the handler must announce at least once that a police dog was to be unleashed and then wait a moment before unleashing. This ruling is consitent with a Kennewick ordinance that provides a canine "must always be under direct and immediate control of the Dog Handler" and never left "unattended under conditions where it could potentially make contact with the public and/or injure anyone." K.M.C. § 26.2.14.04; *see also* K.M.C. § 26.2.14.09. Thus, a reasonable officer, operating under these ordinances and the decided case law, would understand that a verbal warning was required when there was reason to believe the suspect was nearby or in a confined area, and there was no concern for officer safety and there was potential for the canine to injure an innocent bystander. Accordingly, Defendants' motion is denied in part.

iii. Deke Entering Backyard and Officers' Reaction

The next question is whether as of July 13, 2003, the law clearly established that it was unlawful for a police canine to enter a fenced backyard without a warrant and without probable cause with exigent circumstances. Defendants maintain Officer Kohn and the other officers had the authority to enter the backyard because Deke had found the suspect

and the suspect was seen pushing Deke off himself. However, Defendants' position fails to recognize that Deke was unlawfully in the backyard. In Washington, it has been established at least since 1994 in *State v. Mierz,* 72 Wash. App. 783 (1994), that the fenced backyard is part of the "protected" curtilage. Therefore, a warrant is required to enter such. *Groh v. Ramirez,* 540 U.S. 551, 559 (2004). Absent a warrant, probable cause plus exigent circumstances is required. *Id.*; *see also Kirk v. La.,* 536 U.S. 635 (2002) (ruling that officers need either a warrant or probable cause plus exigent circumstances in order to lawfully enter home). Furthermore, as an overnight guest, Mr. Rogers is entitled to assert a claim of wrongful search of curtilage. *See Minn. v. Olson,* 495 U.S. 91 (1990).

Accordingly, the Court finds a reasonable officer on July 13, 2003, would understand that law enforcement, including police canines, could not lawfully enter a fenced backyard without a warrant and/or without probable cause accompanied by exigent circumstances. *See Wash. v. Bessette,* 105 Wash. App. 793 (2001) (finding that exigent circumstances did not justify entry of a home in pursuit of underage drinker) Furthermore, it was established that law enforcement could not create probable cause or exigent circumstances through their own conduct. *See Moreno v. Baca,* 2005 WL 517851 (9th Cir. 2005). Accordingly, Defendants' motion is denied in part.

iv. Officers Use of Force to Subdue Mr. Rogers

Officers Kohn, Bonnalie, and Quackenbush argue their use of force in subduing Mr. Rogers was objectively

reasonable because they were facing a very dangerous and quickly developing situation. The officers submit they had located a suspect, meeting the description of the shirtless suspect that had eluded police by running through a private home and into a neighborhood, who was attacking Deke. Further, Mr. Rogers resisted the officers attempts to subdue him and R.C.W. § 10.31.050 allows officers to utilize non-lethal force to subdue an individual resisting arrest.

Defendants cite to the following cases to support their argument that the officers' actions were objectively reasonable and they are entitled to qualified immunity: *Lamb* v. *Cartwright,* 393 F. Supp. 1081 (E.D. Texas 1975), *aff'd without opinion,* 524 F.2d 238 (5th Cir. 1975), and *Nolin v. Isbell,* 207 F.3d 1253 (11th Cir. 2000). In *Lamb v. Cartwright,* 393 F. Supp. 1081 (E.D. Texas 1975), the individual was suspected of driving while intoxicated and the officer noticed the individual's slurred speech, glassy eyes, and appearance. When the individual pulled away after being told he was under arrest and made some threatening moves, the officer punched the individual causing him to fall to the ground and then handcuffed him. The court found the force used was reasonable.

In *Nolin v. Isbell,* 207 F.3d 1253 (11th Cir. 2000), the officer grabbed the suspect from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back, pushed his head into the side of the van, searched his groin area, and handcuffed him. The arrestee suffered bruising to the forehead, chest, and wrists, which he admitted disappeared quickly, and he did not seek medical treatment.

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The Court determines *Lamb* and *Nolin* are distinguishable based simply on the fact that the force applied by the officers in this case was much more severe and cannot be described as *de minimis*. Mr. Rogers was bitten by a police canine while three officers beat him causing severe physical injuries.

Although not directly on point, the analysis in *Watkins v. City of* Oakland, *Cal.*, 145 F.3d 1087 (9th Cir. 1998), is helpful. The officers and canine in *Watkins* were responding to a silent alarm in a commercial warehouse when they saw an individual running within the building. There was no indication this person was armed. Before releasing the canine, a verbal warning was given twice that a police dog would be released if the suspect did not surrender. The canine was not ordered off the suspect until the suspect was handcuffed. The Ninth Circuit affirmed the district court's denial of qualified immunity as a matter of law because "[w]e agree that it was clearly established that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation." *Id.* at 1093. The Court finds this rule of law applies here and, thus, Defendants' motion is denied in part.

v. Prompt medical treatment

Plaintiffs also claim Mr. Rogers' constitutional due process rights were violated when the officers, aware that Mr. Rogers suffered significant physical injuries, intentionally failed to provide him with timely access to medical care. Defendants contend the delay of forty-five

minutes to an hour between Mr. Rogers' arrest and transport to a medical facility was reasonable because they were investigating the truthfulness of Mr. Rogers' statements concerning who he was and what he was doing at the property.

It is clearly established that officers cannot intentionally deny or delay access to medical care. *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002). The Court finds an objectively reasonable officer would know that a failure to obtain prompt medical treatment for Mr. Rogers' injuries would be a violation of constitutional due process rights. *See City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983); *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003) (radioing for ambulance within five minutes of arrest to transport injured suspect to hospital). Accordingly, the Court denies Defendants' motion in part.

c. Municipality Liability: City of Kennewick or Benton County

The City of Kennewick and Benton County argue Plaintiffs cannot maintain a § 1983 claim against them because Plaintiffs failed to present sufficient evidence of a custom or practice of utilizing police dogs off leash. Plaintiffs respond that a question of fact exists as to whether the City had a custom or usage of using police dogs off leash in residential neighborhoods despite its official policy to the contrary, resting primarily on the deposition testimony of KPD Captains Craig Littrell and Edwin Seiner.

A municipality is not vicariously liable for unconstitutional acts of employees. *Monell v. Dep't of Social*

Servs., 436 U.S. 658 (1978); *Metter v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). The Seventh Circuit summarized the three ways in which a municipality can be held liable under § 1983: "there must be: (1) an express policy that would cause a constitutional deprivation if enforced; (2) a common practice that is so widespread and well settled as to constitute a custom or usage with the force of law even though it is not authorized by written law or express policy; or (3) an allegation that a person with final policy-making authority caused the constitutional injury." *Lawrence v. Kenosha County*, 391 F.3d 837, 844 (7th Cir. 2004); *see also Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992).

In regards to "an express policy that would cause a constitutional deprivation if enforced, the "[c]ity policy 'need only cause [the] constitutional violation; it need not be unconstitutional per se.'" *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (quoting *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992)). City policy causes an injury where it is the "moving force" behind the constitutional violation or where the city itself is the wrongdoer. *Id.*

Plaintiffs point to the testimony of Captain Seiner. However, the Court does not find anything within Captain Seiners' testimony, or the other officers' and captains' testimony, that supports a finding that a triable issue of fact exists as to the existence of an express policy of allowing police canines to conduct unconstitutional searches and seizures. There is nothing *per se* unconstitutional about using a police canine to search without a leash. *See Dennen v. City of Duluth*, 350 F.3d 786 (8th Cir. 2003). Furthermore, a Kennewick ordinance recognized that a police canine "must

always be under direct and immediate control of the Dog Handler" and never left "unattended under conditions where it could potentially make contact with the public and/or injure anyone." K.M.C. § 26.2.14.04; *see also* K.M.C. § 26.2.14.09. Plaintiffs presented evidence that Kennewick police canines, including Deke, have bitten a number of suspects; however, Plaintiffs failed to present evidence that these bites occurred during unconstitutional seizures of suspects. Accordingly, the Court finds Plaintiffs failed to meet their burden in regards to an unconstitutional city policy.

To establish a custom, a plaintiff must demonstrate the existence of a widespread practice or "evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded." *Gillette v. Delmore,* 979 F.2d 1342, 1349 (9th Cir. 2002). A plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence of a single incident or unconstitutional action by a non-policymaking employee. *Navarro v. Block,* 72 F.3d 712, 714 (9th Cir. 1996); *Davis v. City of Ellensburg,* 869 F.2d 1230, 1233 (9th Cir. 1989).

Deputy Jeff Quackenbush was asked the following question: "[a]nd is it, and was it, common practice on July 13 of 2003 for handlers of canines with Kennewick Police Department and the Benton County police department to pursue suspects using canines off the leash." Deputy Quackenbush stated, "[y]es. Like I said, the searches vary. There's circumstances where they're conducted on or off leash." Plaintiffs point to statements such as this to support their argument that Kennewick had a custom of performing unconstitutional canine searches/seizures. The Court finds

such statements fail to establish a custom of repeated constitutional violations.

Plaintiffs also alleged that Kennewick failed to adequately train its canine handlers. To establish a civil rights violation under the "failure to train" theory, the plaintiff must show the municipality's "failure to train its employees in a relevant respect evidences a 'deliberate indifference' to" the plaintiff's rights. *City of Canton v. Harris,* 489 U.S. 378, 389 (1989). The Court finds the evidence Plaintiffs submitted fails to create a genuine issue of material fact as to whether the training a Kennewick canine handler received was "deliberately indifferent" to constitutional rights.

As set out above, Plaintiffs failed to present sufficient evidence of the existence of an unconstitutional policy or custom on the part of Kennewick. In addition, Plaintiffs did not present any evidence of a custom or policy on the part of Benton County. Accordingly, the Court grants Defendants' motion for summary judgment in part dismissing the 42 U.S.C. § 1983 claims against Benton County and the City of Kennewick.

2. Intentional Assault

Defendants argue the battery and assault claims should be dismissed because the conduct at issue was privileged. Plaintiffs argue there is no privilege to use deadly or intermediate force to arrest a suspect when there is no reason to believe the suspect is dangerous. Further, Plaintiffs formulate the issue as follows: whether a jury could find the officers used more force than a reasonably prudent person

would use to arrest a misdemeanor suspect by using a bite and hold police dog to initially seize, and allowing the dog to continue biting the suspect while the police beat the suspect with fists, knees, and a Mag flashlight.

Washington statutes criminalize conduct constituting battery and assault.[8] Yet, Washington police officers are privileged to use an amount of force reasonably necessary to effect an arrest. Accordingly, police officers are liable for assault and battery only when excessive force is used. *Boyles v. City of Kennewick,* 62 Wash. App. 174 (1991); R.C.W. § 10.31-050. Given the officers' conduct, in the light most favorable to Plaintiffs, the Court cannot determine as a matter of law that the officers utilized force reasonably necessary to effect an arrest of "Troy" and/or Mr. Rogers. Accordingly, the jury is to determine whether the force used was excessive. *See Daniel v. State Through Wash. St. Patrol,* 36 Wash. App. 59, 63 (1983). For these reasons, the Court denies Defendants' motion for summary judgment in part.

3. Outrage

Defendants argue the tort of outrage cause of action must be dismissed because Defendants' conduct was not sufficiently extreme under the circumstances because they

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8. "A battery is '[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.'" *McKinney v. City of Tukwila,* 103 Wash. App. 391, 408 (2000). Assault is an intentional attempt to cause apprehension of imminent contact by the person alleging assault. *Orwick v. Fox,* 65 Wash. App. 71, 85 (1992); Restatement (Second) of Torts § 24.

observed Mr. Rogers attacking Deke and resisting arrest. Plaintiffs submit the jury should decide whether the following conduct is outrageous: (1) the use of Deke, a trained "bite and hold" police dog, off leash at night in a residential neighborhood to pursue a misdemeanant, (2) the decision to use Deke off-leash to apprehend a suspect, (3) the failure to call off Deke immediately following Deke's unlawful entry, (4) striking Mr. Rogers in order to arrest him, and (5) the failure to transport Mr. Rogers to the hospital immediately thereafter.

To have a successful tort of outrage cause of action, a plaintiff is required to prove (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress as a result of defendant's outrageous conduct. *Reid v. Pierce County,* 136 Wash. 2d 195, 202 (1998). The first element, "extreme and outrageous conduct," requires the plaintiff to show that the conduct has been "so outrageous in character, and so extreme in danger, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable conduct in a civilized community." *Grimsby v. Samson,* 85 Wash. 2d 52 (1975); *Keates v. City of Vancouver,* 73 Wash. App. 257 (1994); *Dicomes v. State,* 113 Wash. 2d 612, 630 (1989). "The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Phillips v. Hardwick,* 29 Wash. App. 382, 387 (1981).

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In making the initial determination as to whether the conduct complained of was sufficiently extreme to result in liability, a court must consider the following factors:

> (a) the position occupied by the defendant; (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact; (c) whether defendant's conduct may have been privileged under the circumstances; (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and, (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it.

Birklid v. The Boeing Co., 127 Wash. 2d 853, 867, 904 P.2d 278 (1995) (quoting *Phillips*, 29 Wash. App. at 388); *Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 932 (9th Cir. 2001). The court in *Kloepful v. Bokor*, 149 Wash. 2d 192 (2003), helped distinguish emotional distress and severe emotional distress:

> "Emotional distress" includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." Severe emotional distress is, however, not "transient and trivial" but distress such "that no reasonable man could be expected to endure it."

Id. at 203 (citations omitted).

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After considering the submitted evidence in the light most favorable to Plaintiffs, the Court finds reasonable minds could differ on whether the officers' conduct was outrageous. The Defendants as police officers held a position of power and trust. The officers should have been aware that an innocent bystander, bitten by a police dog and struck by police officers, could suffer severe emotional distress; and, Mr. Rogers in fact submitted evidence that he was severely physically injured and suffered severe emotional distress. The officers chose to utilize a trained "bite and hold" police dog in a residential neighborhood at night after sensitizing him to an open location-the backyard-a location the officers even questioned whether the suspect had been. The backyard was utilized as the "sensitizing" item even though the officers should have been aware that an erroneous scent could have been picked up given the open nature of a backyard and when a more reliable sensitizing item-the moped-was available. In addition, the evidence viewed in Plaintiffs' favor, shows that Officer Kohn did not give a verbal warning before releasing an "interested" Deke and the officers struck Mr. Rogers, after entering an unlit fenced backyard, without informing Mr. Rogers that they were law enforcement. For these reasons, the Court finds a triable issue of fact exists as to whether the officers' conduct was "so outrageous in character, and so extreme in danger, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable conduct in a civilized community." Accordingly, Defendants' motion is denied in part; however, the Court notes that an outrage claim cannot be asserted against a municipality and so the claim is dismissed as against Kennewick and Benton County. *See Snyder v. Med. Serv. Corp. Of E. Wash.*, 145 Wash. 2d 233 (Wash. 2001).

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4. Negligent Infliction of Emotional Distress

Defendants argue Plaintiffs cannot maintain a negligent infliction of emotional distress cause of action because the officers' conduct was reasonable under the circumstances and, second, Plaintiffs' negligence cause of action is duplicative of his § 1983 claims. Plaintiffs argue Defendants are liable for Plaintiffs' emotional distress because it was forseeable for Deke to bite an innocent bystander and for him to be damaged by the officers' conduct and a reasonable juror could decide the officers' conduct was unreasonable under the circumstances.

As this is a diversity action brought in Washington, Washington's tort law applies. *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992). The essential elements for a claim of negligence are: (1) the existence of a duty owed to the complaining party, (2) a breach thereof, (3) a resulting injury, and (4) a proximate cause, between the claimed breach and resulting injury. *Degel v. Majestic Mobile Manor,* 129 Wash. 2d 43, 48 (1996); *Pedroza v. Bryant,* 101 Wash. 2d 226, 228 (1984).

The nature and extent of a duty is a question of law, while foreseeability and policy considerations determine the extent of that duty. *Shepard v. Mielke,* 75 Wash. App. 201, 204 (1994); *Hutchins v. 1001 Fourth Ave. Assocs.,* 116 Wash. 2d 217 (1991). Here, the parties do not dispute that the officers owed Mr. Rogers a duty. Therefore, the key issues are whether the officers breached such a duty and whether such breach was a proximate cause of Mr. Rogers' injuries.

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Proximate cause is composed of two elements: cause in fact, or "but for" causation, and legal causation. *Schooley v. Pinch's Deli Market,* Inc., 134 Wash. 2d 468 (1998). "But for" causation exists when the events were produced by an act in a direct, unbroken sequence which would not have resulted had the act not occurred. *Hertog v. City of Seattle,* 138 Wash. 2d 265 (1999). Cause in fact may be decided as a matter of law if reasonable minds could not differ. *Id.* at 275. Washington law also requires "[t]he causal relationship of an accident or injury to resulting physical condition must be established by medical testimony beyond speculation and conjecture." *Miller v. Staton,* 58 Wash. 2d 879 (1961). Where an injury involves medical factors beyond an ordinary lay person's experience, expert testimony is required to establish causation. *Riggins v. Bechtel Power Corp.,* 44 Wash. App. 244, 254 (1986).

For the same reasons the Court denied the Defendants' motion as to the tort of outrage cause of action, the Court finds genuine issues of material fact exist as to whether the officers' breached a duty to Mr. Rogers and whether such conduct was a proximate cause of Mr. Rogers' injuries. Defendants also argue the negligent infliction of emotional distress cause of action must be dismissed because it seeks duplicative emotional distress damages as Plaintiffs § 1983 claims. The Court agrees with Defendants that *Francom v. Costco Wholesale Corp., 98* Wash. App. 845, 864 (2000), and *Johnson v. Department of Social & Health Services,* 80 Wash. App. 212, 230 (1996), stand for the proposition that a plaintiff cannot obtain duplicative emotional distress damages, even though these cases arise in the employment context. However, the Court agrees with Plaintiffs that

dismissal of this cause of action is not the remedy. Rather, double damages can be avoided through appropriate instructions and verdict forms. It will be vital to determine what officer conduct is the cause(s) of Mr. Roger's emotional distress and Mr. Rogers can only recover once for the emotional distress related to this conduct. Thus, the Court denies Defendants' motion in part.

5. False Arrest

Defendants argue the unlawful imprisonment and false arrest claims must be dismissed because the officers had probable cause to arrest Mr. Rogers. Plaintiffs argue Defendants misconstrue Plaintiffs' version of the facts and under Plaintiffs' version of the facts Defendants did not have probable cause to arrest.

A false arrest is only committed by one who has legal authority to arrest or who pretended to have legal authority to arrest. *Bender v. City of Seattle,* 99 Wash. 2d 582, 590-91 (1983); *Jacques v. Sharp,* 83 Wash. App. 532, 536 (1996). The Washington Supreme Court has advised that a false arrest occurs when:

> A person is restrained or imprisoned when one is deprived of either liberty or movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

Id. at 591 (quoting *Kilcup v. McManus,* 64 Wash. 2d 771, 777 (1964)).

"Probable cause is a complete defense to an action for false arrest, false imprisonment, or malicious prosecution." *Jaques v. Sharp,* 83 Wash. App. 532 (1996). "Probable cause for a warrantless arrest exists where the facts and circumstances within the arresting officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense is being committed." *Id.* R.C.W. § 10.31.100 specifically states:

> [a] police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest the person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer . . . .

R.C.W. § 10.31.100. Whether an officer had probable cause is determined by looking at what was known by the officer at the time of arrest. *Dang v. Ehredt,* 95 Wash. App. 670, 678-79 (1999).

It is plaintiff's burden of proof on the issue of unlawful arrest; however, the plaintiff can make a *prima facie* case by simply showing the arrest was warrantless. The burden then shifts to defendant to provide some evidence that the arresting officers had probable cause to conduct a warrantless arrest. Under this standard, the plaintiff has the ultimate burden of

proof, but the burden of production falls on the defendant. "If the defendant is unable or refuses to come forward with any evidence that the arresting officers had probable cause and the plaintiff's own testimony does not establish it, the court should presume the arrest was unlawful." *Dubner v. City & County of San Francisco,* 266 F.3d 959, 965 (9th Cir. 2001).

It is undisputed that Mr. Rogers' arrest was warrantless. Thus, Defendants must provide some evidence that they had probable cause to arrest Mr. Rogers. Initially, the "suspect" committed civil infractions and a misdemeanor. Defendants argue the officers had probable cause to arrest Mr. Rogers for the civil infractions and a misdemeanor because he matched the description of "Troy," he was in the backyard adjoining the initial residence, and Deke tracked Mr. Rogers. The Court determines it is a question of fact for the jury whether the officers had probable cause to believe that Mr. Rogers was "Troy" and whether exigent circumstances existed to allow Deke and the officers to enter the backyard in order to arrest Mr. Rogers. As the court stated in *McBride v. Walla Walla County,* 95 Wash. App. 33, 38 (1999):

> [p]robability, not a prima facie showing of criminal activity, is the standard for probable cause . . . . In a false arrest action, the rule is that unless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause.

Accordingly, the Court denies Defendants' motion in part.

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In addition, the individual officers argue they have state qualified immunity for the false arrest and false imprisonment claims. Washington state qualified immunity utilizes a different analysis than qualified immunity under § 1983. *McKinney v. City of Tukwila,* 103 Wash. App. 391, 407 (2000). "An officer has state law qualified immunity from suit for false arrest where the officer (1) carries out a statutory duty, (2) according to the procedures dictated to him by statute and superiors, and (3) acts reasonably." *Id.* Typically, "police officers in general act under statutory authority to enforce the state criminal laws." *Id.*

The Court finds a triable issue of fact exists as to whether the officers acted reasonably when they decided to utilize a police canine trained to, and given a command to, track and apprehend a misdemeanant suspect, not believed to be armed or dangerous, in a residential neighborhood at night. In addition, Kennewick Municipal Code § 26.2.6.02 specifically provides: "officers will not maintain a pursuit wherein the initial violation is an infraction or misdemeanor and the pursuit occurred as a result of that infraction or misdemeanor. The Court finds the jury should determine whether Officer Kohn acted reasonably when he released Deke without a verbal warning and when he failed to immediately call off Deke after he unlawfully entered the backyard and bit Mr. Rogers. Also, the jury should determine whether the arresting officers acted reasonably when subduing Mr. Rogers.

6. Washington State Constitution Art. 1 § 7

Defendants argue Plaintiffs' violation of Article 1, § 7 of the Washington State Constitution cause of action should

be dismissed because the officers identified themselves and Deke to Mr. Rogers and told Mr. Rogers not to fight the dog. Plaintiffs contend there was no probable cause to enter the back yard or to arrest Mr. Rogers based on Deke's scent and thus this cause of action cannot be dismissed.

Article 1 § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section provides "protection for the citizens of Washington which are qualitatively different from, and in some cases broader than those provided by the Fourth Amendment." *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 803-04 (9th Cir. 2001) (quoting *City of Seattle v. McReady,* 868 P.2d 260 (1994)). To determine whether this Constitutional provision has been violated the inquiry is "whether the State has unreasonably intruded into a person's private affairs." *Id.* 804 n.6. (quoting *Wash. v. Young,* 123 Wash. 2d 173 (1994)). A search without a warrant is presumptively unreasonable. *Wash. v. Bessette,* 105 Wash. App. 793, 797-98 (2001). However, a warrantless search is allowed during exigent circumstances such as: hot pursuit, fleeing suspect, danger to arresting officer or the public, mobility of vehicle, and mobility or destruction of the evidence. The following factors weigh in favor of a finding that exigent circumstances existed: (1) a grave offense (crime of violence), (2) a suspect who is reasonably believed to be armed, (3) trustworthy information that the suspect is guilty, (4) strong reason to believe that the suspect is on the premises, (5) likelihood of escape if the suspect is not swiftly apprehended, and (6) entry can be made peaceably. *Id.* at 798.

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The Court finds the jury should determine whether the officers had probable cause to arrest Mr. Rogers and whether exigent circumstances existed. Here, the suspect was fleeing; yet, the offense was not a grave offense and there was no reason to believe that he was armed or dangerous. The jury should determine whether the state intruded into Mr. Roger's private affairs when it allowed Deke to enter the fenced backyard unannounced and when the officers struck Mr. Rogers. Defendants' motion is denied in part.

7. Washington Dog Bite Statute

Plaintiffs amended their Complaint to assert a claim under R.C.W. § 16.08.040, Washington's dog bite statute. Defendants argue the Court should not apply this statute to police dogs. The statute states:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

R.C.W. § 16.08.040.

Plaintiffs highlight this statute does not contain an exception for police dogs. The Court agrees with Plaintiffs that § 16.08.040 applies to police dogs as the plain language of the statute does not include any exceptions. Interestingly,

in their memorandums, Defendants pointed the Court to a Minnesota case, *Hyatt v. Anoka Police Department,* 680 N.W.2d 115 (2004), for the proposition that it would be an absurd interpretation of the Washington statute to apply it to police dogs. The Minnesota dog bite statute stated:

> If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog but the owner shall be primarily liable. The term "dog" includes both male and female of the canine species.

Minn. Stat. § 347.22 (2004). However, this case was appealed and on February 10, 2005, the Minnesota State Supreme Court reversed, finding that the statute did apply to police dogs as the plain language of the statute did not exclude police dogs.

A finding that § 16.08.040 applies to police dogs is also consistent with R.C.W. § 4.24.410(2). This statute states, "[a]ny dog handler who uses a police dog in the line of duty in good faith is immune from civil action for damages arising out of such use of the police dog or accelerant detection dog." Accordingly, when these two statutes are read together a police dog handler is exempt for liability under R.C.W. § 16.08.040.

However, this police dog handler immunity statute does not protect the police dog owner from suit. In 1988, the Washington Court of Appeals discussed the meaning of "owner" in the dog bite statute in *Beeler v. Hickman,* 50 Wash. App. 746 (1988). The court stated the term "owner" was not limited to the individual who had purchased the dog but also may apply to an individual who has had control and custody of the dog for over a three year period. Accordingly, two individuals/entities could be determined to be an "owner" under R.C.W. § 16.08.040. In the context of a police dog, the dog is owned by the municipality, however, it is the dog handler who controls and takes care of the dog on a daily basis. Therefore, both the dog handler and the municipality could be considered an "owner." The legislature only protects a police dog handler from suit and not the municipality. Therefore, the Court finds Kennewick can be sued under R.C.W. § 16.08.040.[9]

For the above reasons, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment, **(Ct. Rec. 53)**, is **GRANTED IN PART** (42 U.S.C. § 1983 and outrage causes of action are dismissed as to Benton County and the City of Kennewick) and **DENIED IN PART** (all other aspects).

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9. In their reply, Defendants state, "the interpretation of this statute and the extent of the immunity provided is a matter of first impression in Washington, the determination of which should be left to the State court." Even though this is a question of first impression, the Court finds that certification of this issue is not necessary given Washington's clear rules regarding statutory interpretation and the holding in *Beeler v. Hickman,* 50 Wash. App. 746 (1988).

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2. Defendant Dopke's Motion for Reconsideration, **(Ct. Rec. 74), is GRANTED**. The instant order serves as the Court's order in regards to the 42 U.S.C. § 1983 and qualified immunity analysis. The Court will enter an Amended Order Denying Defendant Dopke's Motion for Summary Judgment to address the state causes of action. The Court finds its previous conclusions were not clearly erroneous and thus Defendant Dopkes' Motion for Summary Judgment is still **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to: (A) Enter this Order; and

(B) Provide copies to the counsel.

DATED this 21st day of March, 2005

s/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON FILED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CV-04-5028-EFS

KEN AND MARY LOU ROGERS,

Plaintiffs,

v.

CITY OF KENNEWICK, a municipal corporation, BENTON COUNTY, WASHINGTON, a political subdivision in the State of Washington, RICHARD AND JANE DOE DOPKE, husband and wife, individually and as a marital community, JOHN DOE AND JANE DOE BONNALIE, R.B. KOHN AND JANE DOE KOHN, JOHN DOE QUACKENBUSH AND JANE DOE QUACKENBUSH

Defendant.

ORDER DENYING DEFENDANT DOPKE'S MOTION FOR SUMMARY JUDGMENT

A hearing was held in the above-captioned matter on February 1, 2005. The Plaintiffs Ken and Mary Lou Rogers were represented by Diehl Rettig and Larry Ziegler. Michael McFarland appeared on behalf of Richard and Jane Doe Dopke, and Jerry Morberg appeared on behalf of Benton County. Before the Court was Defendant Dopkes' Motion

for Summary Judgment, (Ct. Rec. 27). After reviewing the submitted material and relevant statutory and case law, and taking oral argument, the Court was fully informed. This order memorializes and supplements the Court's bench ruling denying in part and withholding in abeyance in part Defendant Dopke's motion.

A. Factual Background[1]

On the evening of July 13, 2003, at approximately 12:55 a.m. while on duty with the Kennewick Police Department (KPD), Sergeant Richard Dopke observed a man riding a "mini-moped" without lights and without a helmet on Canal Drive.[2] Sergeant Dopke radioed EDC and activated his overhead lights and video camera to effect a traffic stop, but the moped continued traveling at 25-30 mph, turning onto Kellogg and then Umatilla.[3] Sergeant Dopke activated his siren and followed the moped another block, where the driver turned into the driveway of the residence located at 6902 W. Umatilla. The man drove directly into the garage, at which time a woman closed the garage door behind him.

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1. The Court is to view the facts in Plaintiff's favor when considering a motion for summary judgment. This factual background is created utilizing this standard.

2. Operating a moped without lights and without a helmet is a civil infraction. Willfully failing to stop a motor vehicle when signaled to do so by a police officer is a misdemeanor, R.C.W. § 46.61.022.

3. Failure to stop and driving with willful disregard for lives of property of others is a felony, R.G.W. § 46.61.024.

Appendix D

Sergeant Dopke called for backup units. After the arrival of additional units, Sergeant Dopke made contact with two women, Tara Holland and Pam Sokey, at the residence. Sergeant Dopke told the women that if the person driving the moped would simply identify himself that he would issue him a citation and be on his way. Ms. Holland and Ms. Sokey advised Sergeant Dopke that the individual on the moped, whom they only knew as "Troy," had gone out the back door after putting on a shirt.

Sergeant Dopke authorized a canine track of the suspect by instructing Officer Bradley Kohn, a K-9 handler, to use KPD's German Shepard canine named "Deke." Deke is trained to bite and hold suspects. As Sergeant Dopke waited in the driveway of the residence, KPD Officers Bradley Kahn and Ryan Bonnalie and Benton County Deputy Jeff Quackenbush began tracking for the suspect using Deke.

During the track, Deke became free of his lead and after jumping through a hole in a fence made contact with Mr. Rogers, who had been sleeping in the backyard of a neighboring residence. Mr. Rogers was visiting his daughter and son-in-law and grandchildren. Officers Kohn and Bonnalie and Deputy Quackenbush struck Mr. Rogers with fists, knees, and a flashlight, while Deke continued to "bite and hold" Mr. Rogers, until Mr. Rogers was subdued and handcuffed. Mr. Rogers was released after it was determined that he was not the driver of the moped that Sgt. Dopke had attempted to stop.

Sergeant Dopke resigned from the KPD on October 31, 2003, following notification that he was going to be reduced

in rank as a result of the afore-mentioned events. Kenneth and Mary Lou Rogers filed suit and assert the following causes of action, arising out of Mr. Rogers' July 1.3, 2003, arrest: (1) trespass, (2) assault and battery, (3) unlawful imprisonment and/or false arrest, (4) negligence, (5) gross negligence, (6) wanton/willful misconduct, (7) intentional infliction of emotional distress, (8) negligent infliction of emotional distress, (9) outrage, (10) R.C.W. § 16.08.040 (strict liability), (11) violation of Washington State Const. Art. 1 § 7, (12) Civil Right Violations under 42 U.S.C. § 1983 & 1988.[4]

B. Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that there is an absence of disputed issues of material fact and that he is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c). In other words, the moving party has the burden of showing that no reasonable trier of fact could find other than for the moving party. *Celotex Corp.* v. *Cetrett,* 477 U.S. 317, 325 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.,* 677 F.2d 1301, 1306 (9th Cir.

4. Plaintiffs filed an Amended Complaint following the filing of the dispositive motion adding trespass and R.C.W. § 16.08.040 (dog bite statute) causes of action. As these causes of action were not addressed in Defendant Dopke's motion, the Court does not address these causes of action.

1982). The court is to view the facts and draw inferences in the manner most favorable to the non-moving party. *Anderson,* 477 U.S. at 255; *Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir. 1999).

A burden is also on the party opposing summary judgment to provide sufficient evidence supporting his claims to establish a genuine issue of material fact for trial. *Anderson,* 477 U.S. at 252; *Chaffin,* 186 F.3d at 1213. "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the non[-]moving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City & County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson,* 477 U.S. at 249, 252).

C. Legal Analysis

Sergeant Dopke contends summary judgment in his favor is appropriate because (1) he did not instruct Officers Kohn and Bonnalie and Deputy Quackenbush to conduct an "off leash" search, (2) he had no involvement in releasing Deke from his lead, and (3) he was not aware that Deke was off his lead until after Deke had contacted Mr. Rogers. Plaintiff opposes the motion in its entirety.

1. 42 U.S.C. § 1983 and Qualified Immunity

Sgt. Dopke argues Plaintiffs' 42 U.S.C. § 1983 claim fails because Sgt. Dopke did not perform the allegedly unconstitutional acts himself and he is entitled to qualified immunity. Plaintiffs respond Sgt. Dopke is liable under

§ 1983 because he was integrally and personally involved in Mr. Roger's arrest by unreasonably directing the K-9 unit to track and apprehend a suspect of a civil infraction.

Section 1983 is a remedial statute which provides an avenue of redress to persons injured by the actions of government which violate federal constitutional rights. The statute states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. A plaintiff must demonstrate: (1) a person deprived the plaintiff of a federal constitutional or statutory right and (2) that person acted under color of state law. *Wood v. Ostrander,* 879 F.2d 583, 587 (9th Cir. 1989).

The parties did not dispute that Sgt. Dopke was acting under color of law when he authorized the canine search or that Mr. Rogers has a federal constitutional right to be free from unreasonable seizures and arrests; therefore, the sole dispute is whether Sgt. Dopke deprived Mr. Rogers of his Fourth Amendment rights.

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Because the Court must view the facts in Plaintiffs' favor, the Court finds there is a genuine issue of material fact whether Sgt. Dopke deprived Plaintiff of a federal constitutional right. It is undisputed Sgt. Dopke was not present when Deke became free of his lead, however, Sgt. Dopke was the individual who requested that Deke be used to search for the suspect. Plaintiff has submitted evidence that KPD officers, including Sgt. Dopke, knew canine dogs could be "un-leashed" during searches. Therefore, when Sgt. Dopke authorized the use of Deke to search for the suspect he knew that Deke potentially could become free his lead and he knew that Deke was trained to bite and hold.

Next, Sgt. Dopke argues he is entitled to qualified immunity. Qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The defense of qualified immunity has been extended to police officers. *Harris v. City of Roseburg,* 664 F.2d 1121, 1127 (9th Cir. 1981). A government official is entitled to qualified immunity if (1) the law governing the conduct was clearly established and (2) under that clearly established law, a reasonable official would have believed his conduct to be lawful. *Conn v. Gabbert,* 526 U.S. 286, 290 (1999) ; *Thompson v. Souza,* 111 F.3d 694, 698 (9th Cir. 1997); *Diruzza v. County of Tehama,* 206 F.3d 1304 (9th Cir. 2000). A law is clearly established if "a reasonable official would understand that what he is doing violates that right." *Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir. 1998).

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The Supreme Court has indicated that a certain degree of predictability is required:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640. (1987). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryan,* 502 U.S. 224, 229 (1991; *Know v. S.W. Airlines,* 124 F.3d 1103, 1007 (9th Cir. 1997). This law must be clearly established at the time of defendant's acts. *Conn v. Gabbert, 526* U.S. 286, 290 (1999); *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir. 1994). In addition to looking at case law to determine whether the law governing conduct is clearly established, statutory and administrative procedures also serve as law. *Babcock v. Wash.,* 116 Wash. 2d 596, 618-19 (1991).

The first question is whether "the law governing the conduct was clearly established." The Court finds the law on June 13, 2003, clearly established that the unreasonable deployment of a police dog was unlawful. *See Vathekan v. Prince George's County,* 154 F.3d 173 (4th Cir. 1998); *Priester v. City of Riviera Beach, Fla.,* 208 F.3d 919 (11th

Cir. 2000); *see also Quintanilla v. City of Downey,* 84 F.3d 353 (9th Cir. 1996).

Accordingly, the next question is whether: a reasonable officer on June 13, 2003, would understand that the authorization of the use of a canine, trained to bite and hold, to track a suspect, who had eluded police after committing a civil infraction, in a Kennewick residential neighborhood at night constituted an unreasonable deployment of a police dog. "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Smith v. City of Hemet,* 2005 WL 39124 (9th Cir. 2005). "The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Smith,* 2005 WL 39124 at 9 (quoting *Graham,* 490 U.S. at 397). A Fourth Amendment seizure occurs when "there is a governmental termination of freedom of movement through means intentionally applied . . . even when an unintended person or thing is the object of the detention or taking." *Brower v. County of Inyo,* 489 U.S. 593, 597 (1989).

At the hearing, counsel brought the recent Ninth Circuit decision, *Smith v. City of Hemet*, to the Court's attention. In *Smith,* the Ninth Circuit emphasized the following factors are to be used when determining the reasonableness of force used to effect seizure: (1) severity of crime at issue, (2) whether the suspect posed an immediate threat to safety of officers or others, (3) whether the suspect was actively

resisting arrest or attempting to evade arrest by flight, and (4) any other circumstances that existed at time of arrest. *Id.* at 357 (citing *Graham v. Connor,* 109 S. Ct. 1865, 1872 (1989)); *see also Deorle v. Rutherford,* 272 F.3d 1272 (9th Cir. 2001). "Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Id.* (quoting *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir. 2002).

Under the first factor, the Court finds there was no evidence that the suspect posed an immediate threat to the officers or the public's safety. Sgt. Dopke even stated that he did not believe the suspect was a danger to the community. The suspect was eluding police; yet, he was eluding Sgt. Dopke for what initially was a civil infraction, a minor offense. Kennewick Municipal Code ("K.M.C.") § 26.2.6.02 specifically provides: "officers will not maintain a pursuit wherein the initial violation is an infraction or misdemeanor and the pursuit occurred as a result of that infraction or misdemeanor." The prohibition discusses vehicular "pursuits," however, the purpose of such prohibition was to prevent endangering the public unnecessarily. A jury could determine that a reasonable police officer would believe the policy also extends to non-vehicular pursuits and, thus, the utilization of a trained police dog to track for this suspect in a residential neighborhood at night was unreasonable.

The Kennewick Municipal Code also provides that a police canine "must always be under direct and immediate

control of the Dog Handler" and never let "unattended under conditions where it could potentially make contact with the public and/or injure anyone." K.M.C. § 26.2.14.04; *see also* K.M.C. § 26.2.14.09. However, Sgt. Dopke, and the other officers involved, have all testified during their deposition that they knew that canines were sometimes taken off their lead during a search. Sgt. Dopke also knew that Deke was trained to bite and knew Deke had caused physical harm to suspects in prior police applications.

Accordingly, the Court finds a triable issue of fact exists as to whether a reasonable officer would believe that the authorization of the use of Deke to track the suspect, who had eluded Sgt. Dopke after committing a civil infraction but was not believed to be a dangerous, in a Kennewick residential neighborhood at night was reasonable. Therefore, the Court denies in part Defendant Dopke's Motion for Summary Judgment

2. Intentional Assault

Sgt. Dopke argues he could not have intentionally assaulted Mr. Rogers, as a matter of law, because he was not present when Deke bit Mr. Rogers or the other officers hit Mr. Rogers. Plaintiff submits Sgt. Dopke's physical proximity to the attack is irrelevant on the assault claim because Deke was an agent Sgt. Dopke used to commit the assault.

Assault is an intentional attempt to cause apprehension of imminent contact by the person alleging assault. *Orwick v. Fox,* 65 Wash. App. 71, 85 (1992); Restatement (Second) of Torts § 24. In Washington, the individual victimized by

the assault need not be the individual whom the wrongdoer intended to assault. Washington law provides that "[o]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the means rea is transferred under R.C.W. 9A.36.011 to any unintended victim." *Wash. v. Wilson,* 125 Wash. 2d 212, 218 (1994). Thus, under R.C.W. § 9A.36.011, once the *meas rea* is established, the statute provides that an unintended victim is assaulted if the terms and conditions of the statute are met. *Id.* at 219; *see also* 6 Am. Jr. 2d, Assault and Battery §§ 98 & 99.

The Court concludes it is a question of fact for the jury whether Sgt. Dopke intentionally assaulted Mr. Rogers. The jury can determine whether Sgt. Dopke intended, through the use of Deke, for an individual, i.e. the suspect, to suffer great bodily harm. If the jury answers this question affirmatively, then the *means rea* is established. However, initially, the jury will need to determine whether the level of force used by Sgt. Dopke exceeded that which was objectively reasonable under the circumstances. *See Ramirez v. City of Reno,* 925 F. Supp. 681, 691 (D. Nev. 1996). If the jury finds the use of force was objectively reasonable, the assault claim must fail because the contact was lawful. *See McKinney v. City of Tukwila,* 103 Wash. App. 391, 408-09 (2000). Accordingly, the Court denies in part Defendant Dopke's motion.

3. Negligent Infliction of Emotional Distress

Next, Sgt. Dopke contends Plaintiffs cannot establish an existence of a duty owed by Sgt. Dopke to Mr. Rogers or

that Sgt. Dopke's authorization of Deke to track an allegedly fleeing suspect breached any alleged duty owed. Plaintiff argues Sgt. Dopke is liable for negligent infliction of emotional distress because it was foreseeable for Deke to bite an innocent bystander, citing to Kennewick's ordinances requiring a police dog to be attended to where it could potentially make contact with the public and/or injure anyone and prohibiting a pursuit where the initial wrongdoing was an infraction.

To prove negligent infliction of emotional distress, a plaintiff must establish duty, breach, proximate cause, and injury. *Snyder v. Med. Serv. Corp. of E.W.,* 98 Wash. App. 315 (1999). In regards to injury, the plaintiff must prove that he has suffered emotional distress by objective symptomatology and the emotional distress is susceptible to medical diagnosis and proved through medical evidence. *Kloepfel v. Bokor,* 149 Wash. 2d 192 (2003). The Court finds a question of fact exists for the jury as to whether it was reasonably foreseeable for Deke to bite an individual besides the suspect, especially in light of the Kennewick ordinance requiring that dogs be attended to and the possibility that the canine handler would take Deke off his lead. Accordingly, the Court denies in part Defendant Dopke's motion.

4. Outrage

Sgt. Dopke argues his decision to authorize the use of Deke to track an allegedly fleeing suspect was not so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

Plaintiff submits the jury should decide whether Sgt. Dopke's direction to use Deke off leash in a residential neighborhood at night to pursue an illegal moped driver is outrageous.

The elements of the tort of outrage are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Birklid v. Boeing Co.,* 127 Wash. 2d 853, 867 (1995). The Court finds the jury should determine whether Sgt. Dopke's authorization of the use of Deke in a residential neighborhood at night to search for an individual who initially committed a civil infraction and was not deemed to be a danger to the officers or public was outrageous and extreme. Accordingly, the Court denies in part Defendant Dopke's motion.

5. False Arrest

Sgt. Dopke submits Plaintiffs cannot prove Sgt. Dopke unlawfully restrained Mr. Rogers. Plaintiffs argue Sgt. Dopke is liable for false arrest because he used Deke and the K-9 Unit to unlawfully restrain Mr. Rogers and, thus, Sgt. Dopke procured or instigated the arrest without probable cause.

A false arrest is only committed by one who has legal authority to arrest or who pretended to have legal authority to arrest. *Bender v. City of Seattle,* 99 Wash. 2d 582, 590-91 (1983). The Washington Supreme Court has advised that a false arrest occurs when:

> A person is restrained or imprisoned when one is deprived of either liberty of movement or freedom

> to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

Id. at 591 (quoting *Kilcup v. McManus,* 64 Wash. 2d 771, 777 (1964)). In *Bender,* the Washington Supreme Court noted:

> one may be liable for false arrest or false imprisonment even if he or she is not the person who physically restrains the plaintiff:
>
> > One who participates in an unlawful arrest, or procures or instigates the making of one without proper authority, will be liable for the consequences; but the defendant must have taken some active part in bringing about the unlawful arrest itself, by some "affirmative direction, persuasion, request or voluntary participation."

Id. at 592 (quoting W. Prosser, *Torts* § 11, p. 47 (4th ed. 1971).

The Court concludes Plaintiffs presented sufficient evidence to create a genuine issue of material fact as to whether Sgt. Dopke procured or instigated the false arrest. However, the jury will need to first determine whether Officers Kohn and Bonnalie and Deputy Quackenbush conducted an unlawful arrest and then decide whether Sgt. Dopke's decision to authorize the use of Deke procured

Mr. Rogers' arrest. Accordingly, the Court denies Defendant Dopke's motion in part.

6. Washington State Constitution Art. 1 § 7

Sgt. Dopke submits he did not search or seize Mr. Rogers and, thus, Plaintiffs' claim for an alleged violation of Article 1 § 7 of the Washington Constitution should be dismissed. Plaintiff contends Sgt. Dopke arrested Mr. Rogers without probable cause in violation of Article 1 § 7 of the Washington Constitution by directing the K-9 unit to track and apprehend.

Article 1 § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section provides "protection for the citizens of Washington which are qualitatively different from, and in some cases broader than those provided by the Fourth Amendment." *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 803-04 (9th Cir. 2001) (quoting *City of Seattle v. McReady,* 868 P.2d 260 (1994). To determine whether this constitutional provision has been violated the inquiry is "whether the State has unreasonably intruded into a person's private affairs." *Id.* 804 n.6. (quoting *Wash. v. Young,* 123 Wash. 2d 173 (1994)). A search without a warrant is presumptively unreasonable. *Wash. v. Bessette,* 105 Wash. App. 793, 797-98 (2001). However, a warrantless search is allowed during exigent circumstances such as: hot pursuit, fleeing suspect, danger to arresting officer or the public, mobility of vehicle, and mobility or destruction of the evidence; and the court is to weigh the following factors: (1) a grave offense (crime of violence), (2) a suspect who is

reasonably believed to be armed, (3) trustworthy information that the suspect is guilty, (4) strong reason to believe that the suspect is on the premises, (5) likelihood of escape if the suspect is not swiftly apprehended, and (6) entry can be made peaceably. *Id.* at 798.

Plaintiffs compare an arrest in a fenced backyard to a warrantless arrest in a house because the fenced yard was part of the curtilage. *United States v. Dunn,* 480 U.S. 294, 301 (1987). The Court agrees that generally a warrant is required before an arrest of an individual in a fenced yard can be conducted, absent exigent circumstances. Here, the suspect was fleeing; yet, the offense was not a grave offense and there was no reason to believe that he was armed or dangerous. Because the suspect was reported to have fled on foot, Sgt. Dopke could reasonably believe the suspect was nearby, however, there was no evidence that entry into this backyard could not have been made peaceably or that a verbal warning regarding the use of a police dog could not be used, or even a verbal warning that the dog was being taken off the leash. Thus, the Court finds triable issues of fact exist as to whether the state unreasonably intruded into Mr. Roger's private affairs when Deke entered the fenced backyard unannounced and whether Sgt. Dopke was a cause of this intrusion.

For the above reasons, **IT IS HEREBY ORDERED:** Defendant Dopke's Motion for Summary Judgment, **(Ct. Rec. 27), is DENIED.**

Appendix D

IT IS SO ORDERED. The District Court Executive is directed to:

(A) Enter this Order; and

(B) Provide copies to the parties.

DATED this 2nd day of February, 2005

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

Nos. 06-616 and 06-626

In The Supreme Court of the United States

CITY OF KENNEWICK, *et al.*,

Petitioners,

v.

KEN ROGERS, *et ux.*,

Respondent.

RICHARD DOPKE, *et ux.*,

Petitioners,

v.

KEN ROGERS, *et ux.*,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment rights of an innocent person sleeping in a backyard when an intentionally deployed police canine bit and held him while the officers beat and handcuffed him?

2. Whether those officers are entitled to summary judgment on qualified immunity?

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STATEMENT OF THE CASE

Factual Background

At approximately 12:55 a.m. on July 13, 2003, Sergeant Richard Dopke of the Kennewick, Washington Police Department saw a shirtless man riding a mini motorcycle or moped without a helmet or proper lights, both of which are civil traffic infractions. Pet. App. 20a-21a.[1] The driver failed to stop after Dopke activated his overhead lights and siren, but did not speed or drive recklessly. *Id.*, 20a-21a, 33a. Dopke followed the driver to 6902 W. Umatilla in Kennewick, Washington. *Id.* at 21a. The driver pulled the motorcycle into the garage, and a woman closed the garage door behind him. *Id.* Dopke called for backup, including a police dog (K-9) team. *Id.* Dopke and another officer knocked on the door of 6902 W. Umatilla and asked the person riding the moped to identify himself so Dopke could issue a citation and be on his way. *Id.* Dopke was told that the operator's name was "Troy" and that he had gone out the back door. *Id.*

Although Sgt. Dopke did not fully believe that "Troy" had left the home, he authorized the use of the K-9, Deke, to "track and apprehend" the suspect. Pet. App. 22a and 38a. Initially, Deke was taken to the backyard of 6902 W. Umatilla, where he picked up a scent. *Id.* 22a. Deke was trained to "bite and hold" suspects, and had been known to cause physical harm to suspects in the past. Pet. App. 22a. Dopke testified as to his intent as follows:

> Q. Okay. So it would seem to me that sitting or standing in Officer Kohn's shoes that you

[1] For ease of reference, all references to the Petitioners' Appendix refer to the appendix filed in 06-616.

[Dopke], as supervisor, were directing him to use the K-9 to track the suspect in the back-yards of other people that night?

A. Yes.

Q. In this residential neighborhood?

A. Yes.

Q. And that would include entering the fenced area backyards of these homes?

A. Yes.

Q. Without a warrant?

A. Yes.

Q. And without asking permission of the owners to enter their property?

A. Yes.

Q. In pursuit of a suspect that we've identified was operating this moped?

A. Yes.

ER 64-65; Underlining added.[2]

Kohn testified in deposition:

Q. Okay. Did you understand that Sgt. Dopke was asking you to actually track and apprehend; was that your understanding?

A. That was my understanding.

ER 95-96; Underlining added.

---

[2] Citations are to the Ninth Circuit Excerpts of Record (ER) for Ninth Cir. Case No. 05-35300.

Benton County Deputy Quackenbush, who was assisting in the pursuit, confirms the intent to use Deke in the backyards of the houses to the immediate north in his original narrative of the events:

> Officer Kohn advised us that due to the indications given by the K9, he wanted to search the backyards of the residences that were to the immediate north of 6902 W. Umatilla.

ER 308; Underlining added.

Officers Kohn and Bonnalie, and Quackenbush, started searching the backyards of the homes to the North of 6902 W. Umatilla. Pet. App. 22a.; ER 310. While searching the driveway at 6911 W. Victoria, Deke picked up a scent, and Kohn made an intentional decision to release Deke and let him "work." *Id.* 43a. No announcement or warning was made by Kohn that a police dog was going to be released. Pet. App. 43a; ER 145. The District Court noted that there is a conflicting testimony as to whether Deke's leash became tangled before Deke was released to work. Pet. App. 22a. However, Kohn testified that he thought it "prudent" to unleash Deke and let him "work." ER 180. Officer Quackenbush testified: "He [Kohn] allowed the dog to search off the leash." ER 84. No command was given for Deke to stay when he was released. ER 92-93. Kohn's silence after his release of Deke was a nonverbal command for Deke to continue to search and to apprehend by biting and holding whomever it was he had smelled. ER 248; 249.

Almost immediately after being released, Deke jumped through or over the fence into the backyard of 6911 W. Victoria. Pet. App. 23a; ER 310. Deke was not ordered to come back after he went through the fence. ER

92-93. Officer Kohn heard a yell, and peered over the fence and saw that the canine had bitten and was holding a man by the arm. Pet. App. 23a. Officer Kohn and two other officers kicked down the fence and entered the back yard. Pet. App. 46a. The officers did not have a warrant to enter the enclosed area. There was no probable cause to enter the backyard – even Defendants do not claim that a dog's "detection" constitutes probable cause. *Id.*, 33a-34a. There is no evidence that the officers felt threatened or endangered. Troy was not armed, and the officers did not feel threatened – they did not pull their guns before, during or after they entered the back yard of 6911 Victoria. *Id.*, 34a.

Rather than calling off Deke and releasing Mr. Rogers, the officers began striking him with their fists, knees, and flashlights, while allowing Deke to continue to bite Rogers. *Id.* Mr. Rogers was placed in handcuffs. *Id.*, 32a.

The officers then announced "We got him," and took him to a police car. *Id.*, 26a. At the police car, Dopke told Rogers: "If [you] just would have stopped, [you] would have received a ticket." ER 275. The officers continued to try to get Rogers to confess: "Make it easy on yourself, admit it, Judge Hollenbeck is a hard ass and he will throw the book at you . . . We know you did it, we have it on video. . . . We have a witness that has identified you." ER 275.

However, Mr. Rogers was not "Troy," the man on the moped. Rather, Mr. Rogers was a fifty-year-old salesman with Georgia Pacific. Pet. App. 23a. The backyard belonged to Mr. Rogers' daughter and son-in-law, and Mr. Rogers had fallen asleep there because one of the two locks on the door had inadvertently been locked. *Id.* Rogers testified that he had been woken up by sounds coming

from the driveway. *Id.*, 24a. Rogers described the events as follows:

> I jumped up and with authority, volume and clarity yelled, "Hey, what's going on?" . . . . I was sure this would scare off someone if they were up to no good. . . . There was no verbal response of any kind to my question. There was no light flashed in my direction.
>
> At this moment I felt a brief sense of relief. However, abruptly (2-3 seconds) that all changed when I was attacked by a large furious dog. I did not see the dog in the dark until the last moment as it was lunging at my throat. The dog clamped its jaws on my left arm as I reacted to his lunge at my throat. I was able to tear the dog away briefly by grabbing the top of his mouth (it had a elongated muzzle), but he came right back at me and again was biting down on my arm. This time the dog bit well through my jacket and sunk its teeth deep into the flesh of my arm. During the struggle with the unknown dog, I was spun 180 degrees, stumbling trying to gain my equilibrium and balance. My focus was entirely on getting the dog off my arm.
>
> At this point I heard the fence and/or gate being kicked down. I began yelling and screaming loudly knowing I had to get free from the dog. My back was now to the gate and fence, I could not see what was coming. I was then blindsided with several blows from what felt like fists and baseball bats to my head, sides of my face, back and lower back. I was then driven into the ground as I was already collapsing from the multiple blows. I was sure a group of prowlers had turned their dog on me and I was in the process of being beaten, kicked and bitten on my upper arm and

neck by the dog. My bare legs were cut and bleeding. I could feel and taste the blood coming from my face and head wounds. I was sure the only punishment left was to get stabbed by a knife or shot by a gun. I was completely overwhelmed and was defenseless. I was in extreme fear of my life.

The attack somewhat subsided. This allowed me to try and assess what was happening. I was face down on the ground and for the first time was able to move my head enough to see black boots, or shoes, and black pants of one of the attackers. I continued to move my eyes up the dark form standing nearest to my head. I saw a silvery object on the assailant's jacket that appeared to be a badge of some sort. I was beaten, bleeding, in excruciating pain and did not have my eyeglasses. I still was not sure who was attacking me. Helplessly, I could only say to myself, "Oh my God, Oh my God."

At this point I was handcuffed sharply with my arms behind my back and yanked to a slumped standing position. My back was starting to spasm from the blows I received there.

This was the first time I actually saw that there were several men. Many were in police uniform. I was asking, "What is going on?" There was no direct response to me but background talk that referred to the fact that "We got him!" I stated that they had the wrong person, that I was sleeping on the cushions and that this is my stepson's house.

Pet. App. 23a-26a.

As a result of the attack, Mr. Rogers sustained injuries to his head, arms, back, neck and legs, including scarring, permanent hearing loss, and nerve damage. *Id.*, 26a.

Dopke's claim that he had no reason to know that Deke might be used off leash cannot be accepted on this interlocutory appeal. During the Kennewick Police Department's investigation of these events, Kohn and Bonnalie both said that it was a "common and accepted" practice to use police dogs off leash. ER 69-70. The trial court noted that Rogers submitted evidence that Dopke knew canine dogs could be unleashed during searches. Pet. App. 74a.

Rogers' police dog expert testified:

> When this dog was released for the purpose of finding, it was a nonverbal command to apprehend, by attacking and biting the person he found;
>
> and
>
> The fact that the dog was given a call-off command and responded immediately demonstrates that the dog was under the control of Officer Kohen [sic] at all times . . .
>
> * * *
>
> The dog's immediate response to Officer Kohn's release command is conclusive evidence that the dog was used as an instrument of force (weapon) against Ken Rogers.

ER 400; 396.

The deployment of Deke to search and apprehend constituted a continued pursuit of a misdemeanor suspect in violation of a KPD policy that was intended to minimize risk to the public. ER 29, 43. Dopke called it a "pursuit." ER 43. Dopke retired to avoid a disciplinary loss of rank arising from these incidents. ER 52.

Procedural Background

Mr. Rogers and his wife, Mary Lou Rogers, sued the City of Kennewick and the individual officers in federal district court in the Eastern District of Washington, alleging a variety of state-law and civil rights claims. Pet. App. 27a. Richard and Jane Dopke moved for summary judgment based on qualified immunity. The remaining respondents moved for summary judgment based on the same ground. In two orders, the district court denied both motions for summary judgment. Pet. App. 7a, 19a. The Ninth Circuit unanimously affirmed the district court's orders in an unpublished opinion that has no precedential value in the Ninth Circuit or any of the district courts within that circuit. Pet. App. 1a.

Petitioners ask this Court to review the court of appeals' holding that they were not entitled to summary judgment on qualified immunity. Pet. 1 (06-616); Pet. 2 (06-626). This brief responds to both petitions.

REASONS FOR DENYING THE WRIT

Petitioners seek review on two limited questions: whether a seizure takes place when a police canine "unexpectedly" bites and holds an individual, and whether the officers in this case are entitled to qualified immunity.

Respondents limit their opposition to certiorari to responding to Petitioners' narrow questions.

In the pages that follow, Respondents explain that the decision below does not conflict with decisions of other courts of appeal or of this Court. It should be noted at the outset, however, that Respondents' rebuttal of Petitioners' claim of a split in authority – which is the basis upon which petitioners urge review – is not strictly necessary here because the Ninth Circuit's ruling did not itself establish circuit precedent. Rather, it affirmed the district court's decision that there were disputed issues of material fact on the Fourth Amendment and ancillary qualified immunity questions that precluded summary judgment in an unpublished decision that may not be cited as precedent in the courts of that circuit. Pet. App. 1a. That being the case, there *is no* Ninth Circuit ruling that can be said to conflict with the rulings of other circuits or of this Court. For that reason alone, this Court should deny review.

We now review the views of the lower courts on the questions presented, as if the Ninth Circuit had, in fact, issued a precedential opinion, and show that the other Circuits are in agreement.

A. THE LOWER COURTS AGREE THAT USING A CANINE AGAINST A NON-VIOLENT MISDEMEANANT VIOLATES THE FOURTH AMENDMENT.

The question whether the Fourth Amendment was violated here involves both whether Mr. Rogers was "seized" and whether the force use to effectuate that

seizure was "unreasonable." We treat those issues in turn, showing that there is no split in authority on either issue.

1. All Courts Would Agree That Mr. Rogers Was Seized When the Officers Employed the Canine to Search and Detain Him.

Petitioners argue that the court of appeals' holding is in tension with those of other courts regarding whether a canine can "seize" an individual in the absence of a specific verbal command by a police officer to seize a specific person (Rogers). There is no tension on this point: When an intentionally deployed canine detains a suspect, in the absence of a specific verbal command to seize that specific person, a seizure has taken place.

Every court that has considered whether an actively employed canine can "seize" a suspect has ruled consistently with the court of appeals. In *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998), the Fourth Circuit reached a conclusion identical to that reached by the Ninth Circuit. That court held that an intentionally deployed police dog who bit an innocent bystander, as opposed to the suspect for whom the dog was supposed to be searching, "seized" the bystander. Noting that "a police dog cannot discriminate between a criminal and an innocent person," the Fourth Circuit held that the seizure of the bystander was purposeful. *Id.* at 178. Other federal courts to consider whether a plaintiff's excessive force argument based on the intentional deployment of a canine have held, either explicitly or implicitly, that a seizure has taken place. *See United States v. Lawshea*, 461 F.3d 857, 860 (7th Cir. 2006); *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003); *Gander v. Wood*, ___ F. Supp. 2d ___,

2006 WL 2945964 (D. Or. 2006); *Fidler v. City of Indianapolis*, 428 F. Supp. 2d 857 (S. D. Ind. 2006).

Contrary to Petitioners' argument, *Dennen v. City of Duluth*, 350 F.3d 786 (8th Cir. 2003), is consistent with the court of appeals' holding that an unleashed canine can seize an individual even in the absence of a verbal command. In *Dennen*, an officer and his unleashed canine chased a drunken suspect, who fell into a ravine and suffered brain injury. Although the Eighth Circuit ultimately held that the seizure in that case was reasonable because the suspect was fleeing while carrying an unidentifiable object, its holding presupposes that the plaintiff was seized. *Id.* at 791 ("The key inquiry is whether using a dog without a leash was objectively reasonable under the circumstances.").

Petitioners further argue that the court of appeals' decision is in tension with *Cardona v. Connolly*, 361 F. Supp. 2d 25 (D. Conn. 2005). There, the officer had placed the canine in the back of a cruiser from which the canine escaped. The officer was not actively using the animal during the course of the plaintiff's arrest, *id.* at 27, suggesting that no "seizure" had taken place. In this case, on the other hand, the police officers had intentionally deployed the canine to find and apprehend in the area around 6902 W. Umatilla. Pet. App. 22a. Thus, unlike *Cardona*, in which the officer did not intend to use the canine at the time of the bite and believed that the canine was not actively engaged, the police in this case intended that the canine assist in their search and seizure.[3]

[3] As Petitioners' concede (Pet. 06-616, p. 6), *Cardona* distinguished other cases in which the officers instructed a canine to find and seize a

(Continued on following page)

2. The Officers Intended to Seize Rogers.

Petitioners challenge the lower courts' conclusion that there is a disputed issue of material fact regarding the officers' intent. They argue that it is undisputed that the officers did not intend to seize Rogers. It is well-established that intent is a question of fact, *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983), which must be viewed in a light most favorable to the non-moving party on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this case, the district court and court of appeals, properly viewing the facts in the light most favorable to Respondents, correctly recognized that a genuine issue existed as to intent and left the issue for resolution by the jury.

The officers indisputably intended that the dog find and attack a person in Mr. Rogers' immediate vicinity. "Viewing the facts in the light most favorable to Rogers . . . [O]fficer Kohn had control over the dog when it bit Rogers, and Kohn had effectively ordered the dog to find and bite the individual he was tracking." Pet. App. 3a. This holding is clearly based on the testimony of Rogers' K-9 expert:

> When this dog was released for the purpose of finding, it was a nonverbal command to apprehend, by attacking and biting the person he found;

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suspect. *Cardona*, 361 F. Supp. 2d at 34 (distinguishing the Fourth Circuit's ruling in *Vanthekan* because, in *Cardona*, "as soon as [the officer] became aware of [the canine's] conduct, he acted swiftly in stopping [the canine's] attack"). *See also Adrade v. City of Burlingame*, 847 F. Supp. 760, 762 (N.D. Cal. 1994), *aff'd sub nom., Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996) (police dog escaped from police car before biting plaintiff).

Furthermore, after observing the canine biting Mr. Rogers, the officers allowed the canine to continue its attack, and joined in, proceeding to strike Mr. Rogers with their fists, knees, and flashlights. Pet. App. 24a-25a. Rogers stated:

> During the struggle with the unknown dog, I was spun 180 degrees, stumbling trying to gain my equilibrium and balance. My focus was entirely on getting the dog off my arm.
>
> . . . My back was now to the gate and fence, I could not see what was coming. I was then blind-sided with several blows from what felt like fists and baseball bats to my head, sides of my face, back and lower back. I was then driven into the ground as I was already collapsing from the multiple blows. . . . I was in the process of being beaten, kicked and bitten on my upper arm and neck by the dog. . . . I was completely overwhelmed and was defenseless.

Unlike the cases in which an officer attempts to restrain one person and accidentally restrains another, the officers in this case knowingly used *additional severe force* against Mr. Rogers *after the canine's initial attack,* rather than calling the dog off.

Finally, Petitioners argue that because officers are required to announce the presence of a canine to anyone within an enclosed area, there can be no finding of intent unless the officer verbally commanded the canine to "enter the backyard to find and hold" someone. Pet. in 06-616 at 8. First, this argument assumes that Kohn knew that an announcement prior to deploying Deke was required, or that he would not decide to ignore that requirement, both of which are contradicted by Kohn's failure to make such

an announcement before Deke was released in the driveway. Second, this argument is inconsistent with the case law. Several circuits have held that the release of a canine dog in the absence of a verbal warning can be unreasonable. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 607 (8th Cir. 2003); *Kopf v. Wing*, 924 F.2d 265 (4th Cir. 1991) (reversing grant of summary judgment to defendants where officers did not issue a verbal warning before releasing canine). Indeed, most courts have held that the issuance of a warning prior to releasing a police dog militates *against* a finding of a Fourth Amendment violation. *See, e.g., Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 517 (9th Cir. 1999) (noting that officers gave three warnings in both Spanish and English before releasing police dog into a closed theater pursuant to burglary reports); *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660-61 (9th Cir. 1997) (officer gave two verbal warnings before sending police dog after fleeing suspect, who was drunk and had been harassing restaurant employees), *overruled on other grounds by Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005); *Matthews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) (finding no excessive force as a matter of law where the officer warned plaintiff, a fleeing misdemeanant, several times before releasing the police dog to apprehend him); *Robinette*, 854 F.2d at 911 (holding fatal attack on suspect by police dog objectively reasonable where undisputed testimony showed that police shouted three warnings before releasing dog).

In fact, no court has ever held that the absence of a warning prior to the release of a police canine *precludes* a finding of intent. And for good reason. Under Petitioners' theory, an officer could avoid liability for a canine's conduct simply by declining to notify persons in enclosed

areas of the canine's presence. If silence provides unrebuttable evidence of an officer's lack of intent, police officers could employ overly aggressive and eager canines without fear of liability.

3. The Use of a Bite-and-Hold Canine to Detain a Non-Threatening Misdeamenant Violates the Fourth Amendment.

Petitioners argue that their conduct was reasonable. Pet. 06-616 at 14. This Court should deny review because the Circuits agree that using the level of force employed in this case is unreasonable when the suspect is not threatening and has committed only a minor offense.

To determine whether a Fourth Amendment violation has taken place, courts must first consider whether there is a "seizure," and then whether that seizure is unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). Determining whether a seizure is unreasonable is a context-specific inquiry in which the court must gauge the officer's conduct in light of the severity of the crime, the threat posed by the suspect, and the degree to which the suspect evades arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In this case, both lower courts agreed that the *Graham* factors weighed in favor of Mr. Rogers. The moped operator was guilty of no more than a misdemeanor and posed no threat to the officers. Given the moped driver's relatively minor offenses, and the absence of any indication that the driver posed a threat to the officers, the lower courts' decisions were correct. *See, e.g., Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006) (*Graham* factors weigh against finding of reasonableness when offenses are

minor and suspect poses no threat of harm); *Vinyard v. Wilson*, 311 F.3d 1340, 1347-48 (11th Cir. 2002) (same); *Loria v. Gorman*, 306 F.3d 1271, 1297 (2d Cir. 2002) (same). Furthermore, no court has found the use of a canine reasonable where the offense is a misdemeanor and the suspect poses no threat. Several courts have, however, held that the use of a police dog is unreasonable when the suspect poses no threat to the police. *See, e.g., Smith v. Hemet*, 394 F.3d 689, 703-04 (9th Cir. 2005); *Marley v. City of Allentown*, 774 F. Supp. 343, 345 (E.D. Pa. 1991), *aff'd*, 961 F.2d 1567 (3d Cir. 1992) (finding that the use of a police dog to pursue a suspected misdemeanant who posed no threat to the officer was unreasonable).

Because there is no disagreement among the courts regarding whether the use of a canine against a misdemeanant posing no risk to the police violates the Fourth Amendment, this Court should decline to review the lower court's decision.

B. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Petitioners argue that the lower courts erred in denying their motion for summary judgment based on qualified immunity. As to Sgt. Dopke, case law firmly established on July 13, 2003, that the authorization of a canine track and apprehend violates the Fourth Amendment. As to the remaining petitioners, the court of appeals decision affirmed the district court's conclusion that as of July 13, 2003, the following had been clearly established by case law: (1) failing to give a warning before releasing a police canine to bite and hold is unreasonable; (2) causing a bite-and-hold canine to enter an enclosed area is unreasonable even if the officers

believed that somebody was in that area; (3) allowing the canine, after it had attacked, to continue biting a helpless suspect for at least a minute was unreasonable; and (4) repeatedly striking a subdued and prone suspect is unreasonable. Pet App. 5a. This Court should not review the court of appeals' decision affirming the district court's analysis for two reasons: The lower court correctly determined that Petitioners were not entitled to qualified immunity, and review of that decision would not further develop the law in any meaningful way.

1. Officer Kohn, Officer Bonnalie, and Deputy Quackenbush Violated Respondents' Clearly Established Constitutional Rights.

The court of appeals correctly observed that Petitioners are not entitled to qualified immunity if the facts alleged show that the officers conduct violated a clearly established constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). For a constitutional right to be clearly established, it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (quotation omitted). In this case, the court of appeals correctly determined that, as of July 13, 2003, case law established that the officers' conduct violated Respondents' constitutional rights in four distinct ways. Pet. App. 5a. First, the case law clearly established that the Fourth Amendment prohibits the release of a bite-and-hold police dog without warning. *Kuha*, 365 F.3d at 598-99; *Vathekan*, 154 F.3d at 179 ("Fourth Circuit precedent in 1995 clearly established that failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context.").

Second, it was clearly established that it is objectively unreasonable to cause a bite-and-hold dog to enter into a backyard without a warrant. It is well established that a small fenced-in backyard is part of the "curtilage" of the home. *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986). It is also well established that police cannot intrude upon the curtilage of the home, absent exigent circumstances, without a warrant. *See, e.g., Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003). Furthermore, it is clearly established that, like police officers, the use of police canines is limited by the Fourth Amendment. *See, e.g., Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003) (analyzing use of police canine under the Fourth Amendment); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994).

Third, it was clearly established that allowing a canine to continue biting a suspect after the suspect is subdued is unreasonable. Construing the facts in the light most favorable to Respondents, Rogers was attacked by the canine and screamed. Pet. App. 24a-25a. He tried to fight the canine off one time, but was bitten again and thus began stumbling to regain his balance. Pet. App. 24a. When the officers entered the backyard, Rogers yelled and screamed to get free from the dog, but did not attack the dog or the officers. Pet. App. 25a. The officers struck Rogers repeatedly with "what felt like fists and baseball bats to [his] head, sides of [his] face, back and lower back," and Rogers was driven to the ground. *Id.* Only after Rogers was on the ground was the canine released. It is well established that the continued employment of a canine on a subdued individual violates the Fourth Amendment. *Mendoza*, 27 F.3d at 1362 ("[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine

on a handcuffed arrestee who has fully surrendered and is completely under control.").

Finally, it was clearly established that striking a subdued and prone suspect is unreasonable. *See, e.g.*, *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (excessive duration of a canine attack constitutes excessive force); *Phelps v. Coy*, 286 F.3d 295, 302 (6th Cir. 2002) (beating suspect after he was subdued constituted excessive force).[4]

2. Sgt. Dopke Violated Respondents' Clearly Established Constitutional Rights.

Petitioner Dopke incorrectly argues that as of July 13, 2003, it was not clearly established that "the authorization of a canine track was unconstitutional." Pet. App. 17. Not only does case-law establish that very proposition, but given the narrow construction of Sgt. Dopke's appeal and the limited effect review would have on this case and on future litigants, this Court should not review the court of appeals' decision as it pertains to Sgt. Dopke.

The courts below correctly held that it is clearly established that authorization of a canine to find and seize a fleeing suspect wanted for a traffic violation violates the Fourth Amendment. In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), the Ninth Circuit held that the use of a canine

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[4] Petitioners argue that they are entitled to qualified immunity because it was not clearly established that the unintentional acts of a canine can violate the Fourth Amendment. Pet. App. 1 at 12. Again, insofar as Petitioners contend that the officers acted negligently as opposed to intentionally there exists a genuine issue of fact that must be construed in the Respondents' favor. *See supra* at p. 4.

to track and seize a fleeing suspect initially stopped for a traffic violation could be unreasonable.[5] *Id.* at 1433. Although the officers in *Chew* were entitled to qualified immunity, the court held that the officers who authorized the canine search could be held liable for the canine's actions. *Id.* at 1446. And, of course, there is one important difference between the officers' conduct in *Chew* and Sgt. Dopke's conduct; Sgt. Dopke had the benefit of the rule set forth in *Chew*, whereas the officers in *Chew*, by definition, did not. Thus, construing the facts in Respondents' favor, the court of appeals correctly held that Sgt. Dopke violated Mr. Roger's Fourth Amendment rights and that Sgt. Dopke was not entitled to qualified immunity.[6]

C. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *BROWER* AND *LEWIS*.

Petitioners cite several cases that they allege are in tension with this Court's observation in *Brower v. County of Inyo*, 489 U.S. 593, ___ (1989), that "a seizure occurs

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[5] In fact, the officers in *Chew* released the canine after learning that the fleeing suspect had outstanding felony warrants. *Chew*, 27 F.3d at 1442. In this case, the only offense of which the officers were aware were "Troy's" failure to use proper lights and a helmet while operating a moped. Thus, the offense in this case is less severe, making the corresponding use of force less reasonable.

[6] In any event, even if the court of appeals had erred with regard to Petitioner Dopke's qualified immunity, that single narrow error would not warrant review by this Court. There is no question that the lower court correctly identified the proper legal standard for granting qualified immunity, and this Court rarely grants review when "the asserted error" is the "misapplication of a properly stated rule of law." *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . ").

even when an unintended person or thing is the object of the detention or taking." *See* Pet. in No. 06-626, at 10-13 (citing *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), *Dunnigan*, 390 F.3d 486, and *Berg v. County of Alleghany*, 219 F.3d 261 (3d Cir. 2000)). Similarly, Petitioners argue that the lower courts' opinion is inconsistent with *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1989), in which this Court held that no Fourth Amendment seizure took place when a police car engaged in a high speed chase with a motorcycle accidentally killed a passenger on the motorcycle.

Petitioners' argument that the lower court's holding is in tension with *Lewis* is incorrect. Here, construing the facts in the light most favorable to respondents, Mr. Rogers was the *intended* object of the seizure. When the officers came upon the canine biting Mr. Rogers, rather than ordering the dog to release him, the officers struck him with their fists, knees, and flashlights. Pet. App. 32a. Thus, even if, taken in isolation, the initial canine attack did not constitute a seizure – which respondents would dispute – a seizure was indisputably effectuated as soon as the officers came upon Mr. Rogers, beat him, and arrested him. At that point, the officers knew that Mr. Rogers was the object of their actions. Insofar as the officers declined to order the canine to release Mr. Rogers and physically assaulted and placed him in handcuffs, there can be no argument that Mr. Rogers was the unintended object of the officers' intentional acquisition of physical control. Thus, even if there is inconsistency in the law as to whether an unintended object of an officer's conduct can be "seized," exist, that inconsistency is irrelevant to the resolution of this case.

Evidence that the officers intended to use the canine against Rogers distinguishes this case from the Sixth Circuit's holding in *Dunigan*. There, it was undisputed that the officers immediately "restrained and refocused" the canine upon realizing that the canine was attacking the plaintiff. *Dunigan*, 390 F.3d at 492-93. The evidence also indicated that the canine attacked because of the plaintiff's threatening motion; the canine's failure to attack another person in the house indicated that officers in that case had not actively employed the canine, but rather that it attacked based on a perceived threat. For the same reason, this case is easily distinguishable from other cases in which an officer mistakenly harmed a bystander. *See, e.g., Schultz v. Braga*, 455 F.3d 470 (4th Cir. 2006) (plaintiff shot by an errant bullet aimed at his companion was not seized under the Fourth Amendment); *Bublitz*, 327 F.3d at 489 (officers did not seize suspect's family when they deflated the fleeing suspect's tires); *Medeiros v. O'Connell*, 150 F.3d 164, 167 (2d Cir. 1998) (officers accidentally shot a hostage while intending to shoot a kidnapper).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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